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Supreme Court, U.S.
FILED
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No:

In the

Supreme Court of the United States

DENNIS PEET and JEEMELL SPENCER,

Petitioners,

VS.

CITY OF DETROIT; DWIGHT PEARSON; LOVIER, SERGEANT; SULLIVAN, SERGEANT; HOWARD PHILLIPS; PETERSEN, SERGEANT; DEBORAH NIX; JACKSON, LIEUTENANT; J. FISHER; BARBARA SIMON; WILLIAM RICE; CHARLES HOWARD; MARK AMOS; ED RUDONI; VISBARA, SERGEANT; CATHERINE ADAMS,

Respondents.

On petition for writ of certiorari from the United States Sixth Circuit Court of Appeals, Cases 05-1371 and 05-1373

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THIS COURT ELABORATE ITS DECISION IN ***ALBRIGHT*** AND SET OUT A STANDARD, BRIGHT-LINE RULE REGARDING THE ELEMENTS OF MALICIOUS PROSECUTION, USING THE ELEMENTS AS ARGUED BY THE DISSENTING JUDGE IN THESE CONSOLIDATED CASES; AND THUS APPLY THE ANALYSIS OF THE DISSENT AND ALLOW PLAINTIFFS TO PROCEED WITH THEIR ERRONEOUSLY DISMISSED CASE AGAINST THE CITY OF DETROIT WHERE PLAINTIFFS WERE ARRESTED AND IMPRISONED WITHOUT PROBABLE CAUSE?

The District Court says, NO.
The United States Sixth Circuit Court says, NO
Respondent says, NO.
Petitioner says, YES.

II. WAS THE DISSENTING COURT OF APPEALS JUDGE IN THIS CASE CORRECT IN HOLDING THAT PROBABLE CAUSE DID NOT EXIST FOR PLAINTIFF'S ARREST WHEN THE POLICE WITHHELD EXCULPATORY INFORMATION AND RELIED ON A PATENTLY UNBELIEVABLE WITNESS WHOM EVEN THEY DID NOT BELIEVE IN ORDER TO ESTABLISH PROBABLE CAUSE?

The District Court says, NO.
The United States Sixth Circuit Court says, NO
Respondent says, NO.
Petitioner says, YES.

IN THE SUPREME COURT
OF THE UNITED STATES

DENNIS PETE, and JEEMELL SPENCER,	CASE NO:
Petitioners,	US Sixth Circuit Nos: 05-1371, 05-1373
V	E.D. Mich. 03-71470, 03-72480
CITY OF DETROIT, ET AL.,	
Respondents.	

DISCLOSURE OF CORPORATE
AFFILIATIONS AND FINANCIAL INTERESTS

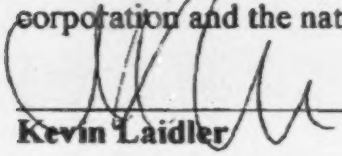
Pursuant to Rule 29, Dennis Pete and Jeemell Spencer makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **NO**.

If the answer is "yes," list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

2. Is there a publicly owned corporation, not a party to the case, that has a financial interest in the outcome? **NO.**

If the answer is "yes," list below the identity of the corporation and the nature of the financial interest.



Kevin Laidler 12-22-07 **Date**

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The decisions of the United States District Court, Eastern District of Michigan, are not recorded (Appendices A - D). These cases were consolidated by the Sixth Circuit Court of Appeals, and reported at 502 F.3d 557 (Appendix E).

STATEMENT OF JURISDICTION

On September 25, 2007, the Court of Appeals for the Sixth Circuit denied plaintiff's direct appeals. The Court of Appeals original opinion was entered September 25, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 USC § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act of omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

U.S. Const. Am IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Am. XIV provides in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Court of Appeals, despite a strong and well reasoned dissent by Judge Holschuh, affirmed the decision of the United States District Court for the Eastern District of Michigan granting summary judgment to defendants on their multi-count lawsuit stemming from their arrest and confinement, and eventual acquittal by jury from charges of armed robbery and murder occurring in the City of Detroit. Plaintiffs argued that their arrest and detention were due to the City's admittedly unconstitutional policy of arresting all individuals at a crime scene and holding them to coerce information, which was the subject of an intense investigation by the United States Justice Department. The

City eventually settled with the government over the investigation

The Court of Appeals held that because Spencer was bound over before the District Court in the state court proceedings to determine probable cause, he was estopped from asserting claims of malicious prosecution and false arrest. Further, the court held that Pete did not supply enough evidence to support a lack of probable cause for his arrest and the existence of a municipal policy. Finally, the court held that Pete was similarly estopped from raising the malicious prosecution claim, and indeed could not do so against Pearson.(Appendix E)

Facts of the incident

On April 27, 2000, Petitioner Jeemell Spencer and his cousin, Dennis Peet, traveled to the Super City Coney Island in the City of Detroit for a meal. Spencer gave his pager number to the attractive counter employee, Feanda Wilson, and left with the food to eat in heir vehicle. Unbeknownst to petitioners, while at the restaurant, three men – not two – robbed a gas station adjoining the restaurant, and stole a coat from Jmo Bracey. One of the robbers entered the Coney Island after Spencer had left and shot a patron in the legs, who later died of his injuries (Appendices A-D).

Feanda Wilson had earlier smoked marijuana with her boyfriend in a car bear the restaurant before returning to work. Wilson became the prime witness for the police. Although she stated that she was hiding behind the counter, she also said that she heard Spencer yell to the gunman, "Shoot this M---F----r too." Pete was accused of stealing the terminally wounded man's jacket. (Appendices A&B).

The pager

Police tracked Spencer by the pager number and arrested him, which in turn led to Pete. The police then told Pete that he "was a witness to the murder of Reed Byrd," and demanded that he participate in the police investigation of the crime. Officer Amos told Pete that he was not under arrest but nevertheless handcuffed him and drove him downtown in a police car, despite his protestations and his preference to be driven by family members.(Appendix A-D)

Misleading and Omitted information

However, Pearson still sought an arrest warrant for petitioners. Petitioners were arrested based on an arrest warrant premised on several grossly misleading statements and glaring omissions by Pearson, as well as a misleading line-up. Indeed, at deposition, Pearson actually stated in regard to Pete that he was only a witness and that he did not know of any probable cause to arrest him.

Witnesses at the scene told the police that neither petitioner was involved. Leon Woodard (the victim shot inside of the restaurant); Jmo Bracey (robbed at the gas station), Julian Latham, and Marvin Benton were all absolutely certain that petitioners were not the attackers.

Bracey specifically told Pearson, the officer-in-charge of the investigation, that the individuals responsible for robbing him and committing the other crimes ***were not Peet or Spencer***. Another witness, Marvin Benton, specifically informed the officer *at the scene* that he could make a positive identification of the perpetrators, of which he was certain were not Peet or Spencer; however, no officer or investigator ever contacted Benton.

Additionally, Kenya Smith, the cook at the Coney Island during the shooting, repeatedly told Defendants of plaintiffs' innocence, particularly Defendant Pearson;

however, this information is not present in the warrant request.

No physical evidence linked petitioners to the scene, and no fingerprints were recovered.

Wilson's Lack of Believability

As noted, supra, Feanda Wilson was the only person to identify Spencer as being involved. She had been smoking marijuana earlier that day. Even Pearon questioned her veracity. Pearson wrote in his notes on May 2 at 8:00 p.m., "Feanda Wilson is the only statement out of place. Setting up polygraph for her for 5-3-00 to see if she is lying about the two suspect[s].... Feanda no longer works at Super Coney Island. Fired for stolen money from business."

Wilson stated that saw one of the men open the driver's door and take her boyfriend's jacket, while the man in the jogging suit went over to a customer who was sitting next to the video game. He entered into a verbal altercation with the customer and then shot him. The man then left the restaurant and shot at Wilson's boyfriend's car; he fled behind some garbage cans while the other men left in a pick up truck. in braids and also wore a white shirt. Wilson said that the man shot the patron in the restaurant and her friend in the car about three times each.

In addition to this statement given the morning after the shooting, Wilson also spoke with Officer Petersen at the scene of the crime right after the shooting occurred. A police report taken at 9:50 p.m. on April 27 listed Feanda Wilson as the person reporting the offense. The report is not consistent with certain portions of Wilson's account given early the next morning. For instance, the police report identified only two perpetrators, whereas Wilson identified three in her later statement. The police report also confused Reed Byrd with Leonard McGlory, stating that complainant # 1 (identified as Reed Byrd in the report's opening) was shot inside the

restaurant, while complainant # 2 (identified as McGlory) was reported as having been shot in the red car outside the restaurant.

Particular facts relied upon by the Dissent in determining that probable cause did not exist

As will be noted *infra*, the facts as determined by the District Court and Court of Appeals majority were incomplete. Specifically:

Pearson's patently false statement that eyewitnesses Bracey and Anderson would testify that Spencer and Peet (identified in the report as "Defendants # 1 and # 2"), had robbed them at the gas station next to the Coney Island restaurant. J.A. at 381. In fact, absolutely nothing in their statements implicates Spencer or Peet. That same report states that Feanda Wilson saw "Defendants # 1 and # 2," *i.e.*, Spencer and Peet, attempt to rob Reed Byrd of his coat, and heard "Defendant # 1," *i.e.*, Spencer, tell the unidentified gunman to shoot Byrd. The judge who made the probable cause determination obviously would have relied on the fact that, according to Pearson's report, three separate eyewitnesses-Wilson, Bracey and Anderson-all had identified Spencer and Peet as participants in the crime prior to their arrests, an extremely inculpatory fact that was, however, undeniably false.(Appendix E)

Pearson's report stated that Wilson, the key witness, would testify that she positively identified Spencer and Peet in a show up/line up at the police station.While not technically a false statement, it is patently misleading. It would lead any judge to believe that Wilson's eyewitness identification of Spencer and Peet in the lineup at the police station occurred *before* the arrests. In fact, the identification did not occur until *after* the arrests. Because the probable cause determination must be based on what evidence existed at the moment of the arrest, the evidence submitted to the

judge should have been confined to the evidence Pearson had available when Spencer and Peet were taken into custody. Evidence of Wilson's later eyewitness identification should not have been submitted to the judge for consideration in determining whether probable cause existed at the time of the arrests.(Appendix E)

The report failed to note discrepancies between the physical descriptions of the robbers given by witness John Anderson and by Feanda Wilson. Wilson described the gunman as a black male, 20-23, 5'7", 165-170, light complexion, braided hair, light grey jogging suit, white shirt. She described the man who gave her his pager number, *i.e.,* Spencer, as a black male, 20-25, 5'4"-5'5", 170, dark complexion, mustache, braids, wearing a black leather jacket and dark pants. The other accomplice, *i.e.,* Peet, was described as a black male, 20-25, 5'8", 180, light complexion, low cut hair, gray hooded sweatshirt, light colored pants. Anderson's description of the gunman matched Wilson's statement. However, Anderson stated that one of the other accomplices was wearing a red pullover jacket and a red skull cap. This description was completely inconsistent with Wilson's descriptions of Spencer and Peet.(Appendix E)

The physical descriptions of the perpetrators given by the witnesses would comfortably fit a large number of African-American men.(Appendix E)

Pearson's report fails to note that although the initial police report indicates that there were only two perpetrators, Wilson later stated that there were three. (Appendix E)

The report fails to mention that although Wilson initially told the responding officer that the suspects were driving a light blue Ford F-150 pickup truck, and later said it was a dark blue Ford F-150, Peet's vehicle was actually a midnight blue Dodge Ram.(Appendix E)

It was undisputed that Pearson came to doubt the veracity of Wilson's statement. On May 2nd, just four days after he submitted his report, he wrote in his Progress Notes that he planned to arrange for Wilson to take a polygraph test because her statement was out of line with the statements of all other witnesses. Pearson admitted at his deposition that he might have had doubts about the truthfulness of Feanda Wilson's statement even *before* the warrant was issued.(Appendix E)

Acquittal

Petitioners were incarcerated until the conclusion of their trial. A jury found both men not guilty.

2. Initial Proceedings in District Court

Petitioners filed suit in Wayne Circuit Court alleging various state law claims as well as federal civil rights claims based on malicious prosecution and false arrest. Respondents removed the case to the United States District Court for the Eastern District of Michigan, Judge John Corbett O'Meara presiding.

The District Court primarily based its decision on the estopple effect of the state court's probable cause determination, despite this determination being based on incomplete, untruthful, and intentionally omitted information. (Appendices A-D).

3. **The Court of Appeals Decision**

The Court consolidated these case on their own volition. The majority again based its rationale on the existence of probable cause in affirming the District Court. However, Judge Holschuh, sitting on the Court by

assignment, issued a lengthy and well reasoned dissent. (Appendix E)

Judge Holschuh first noted that the Sixth Circuit had not officially sanctioned any particular set of elements in regard to Malicious Prosecution. However, he suggested the following elements:

1. The defendant is a person who does not have absolute prosecutorial immunity for his or her conduct in the criminal prosecution of the plaintiff;

2. There was no probable cause for the initiation and maintenance of the criminal prosecution of the plaintiff;

3. The defendant intentionally influenced or participated in the initiation or the maintenance of the criminal prosecution of the plaintiff;

4. A person in defendant's position would have known that the facts and circumstances were not sufficient to justify a reasonable belief that the plaintiff had committed the offense with which the plaintiff was charged; and

5. The criminal prosecution of the plaintiff was subsequently terminated in favor of the plaintiff (Appendix E)

Further, based on the aforementioned facts, Judge Holschuh's application of the suggested elements of malicious prosecution as well as the traditional elements of false arrest resulted in a decision quite the opposite of the majority opinion:

1. The summary judgment in favor of Pearson and the City of Detroit on plaintiffs' claims of being arrested without

probable cause should be reversed as to both Spencer and Peet.

2. The case should be remanded to the district court for further proceedings on plaintiffs' claims of being arrested without probable cause because:

a. No jury issue is presented as to the arrest of Peet without probable cause. The undisputed facts show that Peet was illegally arrested without a warrant and that he is entitled to summary judgment against Pearson on this claim.

b. There is a genuine issue of material fact as to whether Peet's illegal arrest was caused by the City of Detroit's policy of arresting witnesses to crimes.

c. A jury issue of whether there was probable cause for Spencer's warrantless arrest is presented by the facts and circumstances of the case in view of the false inculpatory statements and the omitted exculpatory statements made by Pearson in his investigative report submitted to the prosecuting attorney and, in turn, to the judge.

d. Pearson is not entitled to qualified immunity on plaintiffs' claims of arrest without probable cause.

3. The case should be remanded to the district court for further proceedings on plaintiffs' claims of being wrongfully prosecuted because:

a. There is a genuine issue of material fact as to whether there was probable cause for the prosecution of plaintiffs; and

b. There is a genuine issue of material fact as to whether plaintiffs are estopped from asserting their claims of wrongful prosecution.

c. Pearson is not entitled to qualified immunity on plaintiffs' claims of wrongful prosecution.(Appendix E)

REASONS FOR GRANTING THE WRIT

1. There is a split of authority among the Circuits as to the proper elements of claim of malicious prosecution, which has been in a state of flux since this Court's decision in *Albright v Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114, (1994). The Sixth Circuit has never actually officially adopted a standard test for malicious prosecution claims. If this Court applies the elements as suggested by Judge Holschuh in his dissent, petitioners claim would proceed to trial.

There is currently an "embarrassing diversity of judicial opinion" over the composition, or even existence, of a claim for "malicious prosecution" founded in § 1983. Albright v. Oliver, 975 F.2d 343, 345 (7th Cir.1992), rev'd, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). For example, some circuits hold that a claim for malicious prosecution is based on four elements:

The First Circuit notes that a malicious prosecution claim requires the plaintiff establish that (1) the criminal action was initiated and instigated by defendants; (2) the same culminated in favor of the plaintiff; (3) defendants acted with malice and absent probable cause; (4) and plaintiff suffered damages. See eg Britton v. Maloney, 196 F.3d 24 (1st Cir.1999).

The Second Circuit seems to follow this rationale, but without the damages element:

"To maintain a cause of action for damages under Section 1983 for malicious prosecution, a plaintiff must allege that (1) the defendant commenced a criminal proceeding against him; (2) the prosecution ended in his favor; (3) there was a lack of probable cause for commencing the proceeding; and (4) the defendant acted with malice. Murphy v. Lynn, 118 F.3d 938, 947 (2d Cir.1997)"

The Third Circuit however, while acknowledging the Albright need a deprivation of liberty, notes that such an added element may be met by being required to post bail, restrictions on travel, and other types of onerous non-custodial restrictions. *See Gallo v. City of Philadelphia,* 161 F.3d 217, 222 (3d Cir.1998).

The DC Circuit has a damage element as well, similar to the Second Circuit. The Circuit requires, "special injury occasioned by plaintiff as a result of the original action." Pitt v. District of Colombia, 491 F.3d 494 (2007). It is unclear if the Third Circuit's "restriction on travel" would arise to the level of the DC Circuit's "special injury."

While the Eighth Circuit has yet to determine whether a claimant can bring a constitutional claim under § 1983 for malicious prosecution, see Pace v. City of Des Moines, 201 F.3d 1050, 1055 (8th Cir.2000), it follows the Fifth Circuit in holding that any such claim would require the claimant to prove "all common law elements of malicious prosecution ... as well as proof of a constitutional violation." Castellano v. Fragozo, 352 F.3d 939, 949 (5th Cir.2003) (en banc). Similarly, the Tenth Circuit, although not deciding on a specific test of its own, uses the common law tort as a basis for the elements of a federal claim, although property seizure can amount to the necessary seizure for constitutional analysis. Becker v Kroll, 494 F.3d 904 (10th Cir. 2007).

The Eleventh Circuit uses a similar "common law plus" test:

"[T]his Court examined both federal law and Georgia law and indicated that, for purposes of a § 1983 malicious prosecution claim, the constituent elements of the common law tort of malicious prosecution included: (1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and without probable cause; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused. We note that these are also the same elements required under Alabama law for the tort of malicious prosecution." Wood v Kesler, 323 F.3d 872 (11th Cir. 2003).

However, the Seventh Circuit in absolute contrast has held that when ever a state law malicious prosecution claim is available, there can BE NO FEDERAL MALICIOUS PROSECUTION CLAIM AT ALL even if the plaintiff makes out such a case:

> "[T]he opportunity to sue in state courts usually supplies all the process that is due to redress unauthorized activities of state employees . . . What this means is that satisfying the elements of the state-law tort of malicious prosecution, far from being the foundation of a constitutional tort as the district judge believed, *knocks out* any constitutional tort of malicious prosecution." Newsome v. McCabe, 256 F.3d 747 (7th Cir. 2001).

The Ninth Circuit

The use of common law or state law malicious prosecution claims as a template becomes more problematic when the myriad of different standards from each states common law is applied. For example, within the Ninth Circuit, Washington state law provides: "[a] prima facie case of want of probable

cause is established by proof that the criminal proceedings were dismissed or terminated in favor of the party bringing the malicious prosecution action." Peasley v. Puget Sound Tug & Barge Co., 13 Wash.2d 485, 125 P.2d 681, 688 (1942). However, a defendant may rebut such a prima facie case, and prove probable cause as a matter of law, by offering unrefuted evidence that before instituting criminal proceedings, he or she made to the prosecutor a full and fair disclosure, in good faith, of all material facts known to him or her, and that the prosecutor thereupon filed a charge. Id. Had the Court analyzed the Sixth Circuit elements under this rationale, the case would clearly have been resolved in favor of petitioners.

However, the situation in the Sixth Circuit is even more abysmal. As noted by Judge Holschuh in his well reasoned dissent:

> The dissenting opinion in Frantz proposed the following elements for a constitutional tort claim of malicious prosecution: (1) a seizure within the meaning of the Fourth Amendment by someone not entitled to absolute prosecutorial immunity; (2) objectively unreasonable prosecutorial action taken to bring the plaintiff before the court, independent of any initial physical seizure; and (3) termination of the criminal proceeding in favor of the plaintiff. Frantz, 245 F.3d at 879-80 (Gilman, J., dissenting)

As noted in Judge Holschuh's dissent, the Sixth Circuit has no official test for malicious prosecution. Looking to other circuits only results in a hodge-podge of conflicting tests, some of which are as nebulous as the Sixth Circuit's. This Court must provide guidance to the circuits to create a unified approach to this continuing conundrum.

3. This type of case is likely to be repeated.

As noted, the Sixth Circuit still does not have a consistent test to be applied to malicious prosecution cases. Similarly, the Eighth and Tenth Circuit's have no officially sanctioned test. The Seventh Circuit has no test, as there is no Federal malicious prosecution at all allowed in that Circuit. Thus, there is no question that future litigants will continue entreating this Court to discern the proper boundaries of the tort, irregardless of what circuit the litigant's hail from.

4. The well-reasoned opinion of Judge Holschuh in his dissent is the proper analysis of the facts and law applicable to the case at bar. A miscarriage of justice would befall both petitioner's in this case if the erroneous interpretation of the facts and law of the Sixth Circuit majority is allowed to stand. Specifically, in regard to petitioner Pete, Judge Holschuh found that there was no question of material fact that probable cause did not exist for Pete's arrest – the exact opposite holding of the majority.

Judge Holschuh specifically disagreed with majority and found that summary judgment for against both petitioners should be reversed on the issues of false imprisonment and malicious prosecution against both the City of Detroit as well as individual defendant Pearson. Further, the dissenting Judge found that Detective Pearson was denied qualified immunity due to the extent, knowledge, and nature of his omissions and graphic use of the patently incredible eyewitness account of Feanda Wilson.

Finally, there is no question that the City of Detroit maintained a blatantly unconstitutional policy of rounding up and detaining possible witnesses to crimes and holding them under duress to coerce them into divulging any information. This policy was specifically noted in this case through the

testimony of Sergeant Felix Kirk of the Detroit Police Department, testifying in the case of Taylor v. City of Detroit, 368 F.Supp.2d 676. The City of Detroit cannot continue to trample on the rights of innocent citizens through such Gestapo tactics yet hide behind the shield of government immunity.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.C.P. 56(c). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," the Supreme Court has held, "there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp, 475 U.S. 574, 587 (1986) (quotation omitted).

ANALYSIS

A. THIS COURT MUST SET OUT THE PROPER BOUNDARIES OF FEDERAL MALICIOUS PROSECUTION CLAIMS.

There is at present an "embarrassing diversity of judicial opinion" over the composition, or even existence, of a claim for "malicious prosecution" founded in § 1983. Albright v. Oliver, 975 F.2d 343, 345 (7th Cir.1992), rev'd, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). This Court in *Albright* did not produce a majority opinion, but a majority of justices agreed that the right to be free from prosecution without probable cause was not a substantive due

process right, but rather was a violation of the petitioner's Fourth Amendment right to be free from unreasonable seizures. See id. at 271, 114 S.Ct. 807 (plurality); id. at 275, 114 S.Ct. 807 (Scalia, J., concurring); id. at 280, 114 S.Ct. 807 (Kennedy, J., concurring in judgment and joined by Thomas, J.); id. at 281, 114 S.Ct. 807 (Ginsburg, J., concurring); id. at 288-89, 114 S.Ct. 807 (Souter, J., concurring in judgment). However, no specific elements were spelled out to determine what actually amounted to malicious prosecution in the federal sense.

The elements spelled out by the dissent in the instant case take a common sense approach which include the elements of the tort as stated in a majority of the circuits. Judge Holschuh's suggested elements amount to:

1. The defendant is a person who does not have absolute prosecutorial immunity for his or her conduct in the criminal prosecution of the plaintiff;

2. There was no probable cause for the initiation and maintenance of the criminal prosecution of the plaintiff;

3. The defendant intentionally influenced or participated in the initiation or the maintenance of the criminal prosecution of the plaintiff;

4. A person in defendant's position would have known that the facts and circumstances were not sufficient to justify a reasonable belief that the plaintiff had committed the offense with which the plaintiff was charged; and

5. The criminal prosecution of the plaintiff was subsequently terminated in favor of the plaintiff.

These suggested elements create a harmonious balance between the circuits that have generally used

common-law state malicious prosecution claims, while eliminating the use of the more esoteric elements of every state that may be part of the circuit. The only true discrepant circuit under these suggested elements would be the Seventh with its all out prohibition on the federal tort.

B. PROBABLE CAUSE DID NOT EXIST FOR THE ARREST OF PETITIONERS, AND ANY PROBABLE CAUSE THAT EXISTED AT ANY POINT IN THE PROCEEDINGS WAS ERADICATED.

The District Court determined "[t]here may be enough evidence to create a genuine issue of material fact regarding Pearson's alleged omissions and mischaracterizations regarding Bracey's and Anderson's statements." (Appendix A & B) The court nevertheless found, with reference to both questions of probable cause for plaintiffs' arrests and probable cause to bind plaintiffs over for trial, that "Wilson's eyewitness report" alone established probable cause. However, as noted by dissent, the contents of the report were misstated to such an extent that the state court was misled during the preliminary examination.

The effect of Wilson's statement cannot be understated. Wilson's statements diametrically opposed the statements of the other witnesses. Further, the statements attributed to her ability to identify petitioners in a line up was instrumental to the state court's determination of probable cause. Both Petitioners were arrested prior to this line up, based on the cryptic, disjointed, and contradictory statements of Wilson. As noted by the dissent:

> I believe that this same analysis must be applied when an arrest warrant is sought following a warrantless arrest. The probable cause determination by an impartial judge is

> more than a "rubber stamp" after the fact of an arrest. The judge is required to make an independent determination of whether probable cause existed at the moment of the arrest. If it is a constitutional violation to submit false statements and omit material facts when seeking a warrant prior to an arrest, it is also, in my opinion, a constitutional violation to submit false statements and omit material facts when seeking a judicial determination of probable cause following a warrantless arrest. The constitutional requirement of a "fair and reliable determination of probable cause" applies with equal force in both cases.

While more akin to the false arrest/imprisonment aspects of this case, *infra*, Judge Holschuh also applied this rationale to the malicious prosecution context:

> I believe that Pearson had good reason to believe that Wilson, his key witness, was not a credible witness. It is undisputed that, no later than May 2, 2000, long before the preliminary hearing on May 24, 2000, he came to question her credibility. His Progress Notes on May 2, 2000 indicate that her statement was out of line with those of the other witnesses and he planned for Wilson to take a polygraph test. It is not clear from the record, however, whether he ever communicated this doubt to the prosecutor or to the preliminary hearing judge who bound plaintiffs over for trial or, if he did, when this was done. Pearson himself testified that he did not put that extremely exculpatory fact in his

> investigative report: "If any of us have any doubtfulness, then we'll let the prosecutor know maybe on a piece of paper that witness may be questionable, but it never goes into the investigative report." There is absolutely no evidence that Pearson ever noted his doubtfulness "on a piece of paper" given to the prosecutor.
>
> * * *
>
> In my view, if Pearson concealed from the prosecutor his doubts about the credibility of his key witness, or did not make such a disclosure at a time and in a manner for this exculpatory information to be properly given to defense counsel and considered by the magistrate judge at the preliminary hearing, Wilson's eyewitness identification of the plaintiffs at the police lineups should be given little or no consideration in determining whether there was, in fact, probable cause for the initiation and maintenance of the criminal prosecution against plaintiffs.

It seems somewhat commonsense that a prosecution continued well after an even proper arrest may still amount o malicious prosecution. For example, an arrest premised on information given by an anonymous informant may still be quashed if the informant is determined to be unreliable or lacking in credibility. There is no reason to apply a less strenuous standard to a incredible witness who otherwise is named.

An analogous situation would occur where a witness describes a criminal event, then later admits that he learned about the event through ESP or in a dream. Such information

could not be considered credible, yet as long as the ESP discussion was left for after the preliminary examination, despite being known to the arresting officers, the majority opinion would nevertheless insulate the municipality and officer from any civil liability.

Indeed, it has been held that the determination of a state court as to probable cause at a preliminary hearing would not be dispositive of the malicious prosecution claim in certain circumstances. *Probable cause to continue a prosecution may disappear with the discovery of new exculpatory evidence after the preliminary hearing.* In such a case, state actors who are made aware of this evidence but then suppress it may be liable for malicious prosecution under § 1983. See, e.g., Weg v. Macchiarola, 995 F.2d 15, 17-18 (2nd Cir.1993); Haupt v. Dillard, 17 F.3d 285 (9th Cir. 1994). Again, such a discrepant holding between Circuits reinforces the need for this Court to codify the proper standard of such cases.

The Third Circuit has addressed the situation of a similar lack of evidence inclusion in Wilson v. Russo, 212 F3d 781 (3rd Cir 2000), relied on by the dissent. In that case, the officer misrepresented to the prosecutor, and the judge, that two witnesses maintained that the suspect in that case was six-feet-three inches tall to six-feet-five-inches in height. However, the plaintiff was substantially shorter, at five-foot-eleven-inches. The officer in Wilson also failed to include that other witnesses failed to identify plaintiff as the shooter. The Third Circuit held that omissions are made with reckless disregard for the truth if an officer withholds material facts and that independent exculpatory evidence that is known by the arresting officer could outweigh the identification such that probable cause would not exist. Id at 790. Similarly in the case at bar, Pearson omitted the exculpatory, and overwhelming, eyewitness testimony of Bracey, Latham, Woodard, Smith, and Benton who all maintained that Peet and Spencer were innocent.

Wilson also dispels the majority and trial court's sole reliance on the Wilson eyewitness statements and identification:

> The defendants maintain that a positive identification by a victim is sufficient by itself to establish probable cause that the identified party was the offender. While we agree that a positive identification by a victim witness, without more, would usually be sufficient to establish probable cause, this qualified precept cannot be rendered absolute. Independent exculpatory evidence or substantial evidence of the witness's own unreliability that is known by the arresting officers could outweigh the identification such that probable cause would not exist. Each case must therefore be examined on its facts.

212 F.3d at 790

In the instant case, examined solely on its individual facts, Feanda Wilson 's testimony was of such a nature that it was completely outweighed by her inherent unreliability and contradictory nature of every other witness. In essence, Pearson based his arrest and continued seeking of prosecution against petitioners on the basis of a witness who was as reliable as a witness based on ESP – despite his knowledge of this infirmity.

As noted by dissent, Pearson's knowledgeable involvement in this state of affairs cannot be denied:

> In my view, if Pearson concealed from the prosecutor his doubts about the credibility of

> his key witness, or did not make such a disclosure at a time and in a manner for this exculpatory information to be properly given to defense counsel and considered by the magistrate judge at the preliminary hearing, Wilson's eyewitness identification of the plaintiffs at the police lineups should be given little or no consideration in determining whether there was, in fact, probable cause for the initiation and maintenance of the criminal prosecution against plaintiffs.(Appendix E).

The dissent was correct in ignoring the completely incredible statements and identification by Wilson. Applying the factors for malicious prosecution suggested by Judge Holschuh with this correct analysis of the factual basis specific to this case results in the case continuing to trial for final determination by a jury.

C) THE LACK OF PROBABLE CAUSE APPLICABLE TO THE MALICIOUS PROSECUTION CLAIM UNDER 42 U.S.C. § 1983 IS EVEN MORE STRONGLY APPLICABLE TO THE WARRANTLESS ARREST OF PETITIONERS.

Petitioner Spencer

Petitioner Spencer was guilty of the crime of giving an attractive counter worker at a Coney Island his pager number – that is not in dispute. However, Pearson traced that pager number to Spencer and arrested him without a warrant shortly thereafter. As noted by the dissent:

> If Wilson's statement, standing alone, were reliable enough to support probable cause for

> Spencer's arrest, then Pearson should have immediately sought an arrest warrant. Pearson, however, obviously felt the need to obtain additional evidence to justify the warrantless arrest. In County of Riverside, the Supreme Court held that "delays for the purpose of gathering additional evidence to justify the arrest" were just one example of unreasonable delays in seeking an arrest warrant. 500 U.S. at 56, 111 S.Ct. 1661. Pearson's Progress Notes indicate that three hours after Spencer's arrest, and prior to writing his request for an arrest warrant, Pearson arranged to have Wilson identify Spencer in a lineup. Before writing the request for an arrest warrant, Pearson also went to the scene of the crime to see if any video cameras were running when the crime occurred and took the gas station cashier, Salah Alhalmi, to the police station for questioning.

Further,

> There is no question that after Spencer returned a call placed to one of the pager numbers given by Wilson, Spencer was arrested based only on this evidence. However, even though Wilson said that the man who gave her the pager number said his name was "Mail," there is no evidence that Spencer ever used that name. Pearson obviously believed that the evidence against Spencer was not enough to justify probable cause for the arrest, because he did not prepare his report and request for a warrant until after Wilson had identified Spencer in a police

lineup. As noted earlier, however, Wilson's eyewitness identification of Spencer at the lineup must be excluded from consideration because it occurred after his arrest.(Appendix E)

Petitioner Pete

Ostensibly, Peet was discovered through the connection with Petitioner Spencer. Upon questioning, he was arrested as soon as he admitted to being a witness to the incident. The District Court found that his admitted presence, along with the now discredited statements of Wilson, was enough to support the probable cause determination of the state court in supporting petitioner' arrest.(Appendix E)

Peet testified that he was arrested as soon as he acknowledged that he had witnessed the robbery at the Coney Island restaurant. As noted by the dissent, Peet's admission that he was present at the Coney Island restaurant on the night in question is, of course, insufficient to establish probable cause for his arrest. United States v. Castro-Gaxiola, 479 F.3d 579, 583 (8th Cir.2007).

However, in relation to Peet, the dissent went even further. The dissent concluded that there was no question of material fact that Pete was *absolutely unconstitutionally arrested.*

The dissent based this determination on the order of events as they occurred, the amount of information admittedly known to Pearson and not disclosed to the examining magistrate, and the existence of probable cause at the essential time period of the arrest. The dissent noted again that ***Pearson admitted in deposition that he did not know of any probable cause to arrest Pete.***

The dissent specifically held:

> In my opinion, no reasonable jury could find that probable cause existed for Peet's arrest. None of the witness statements, including Wilson's, incriminates Peet. Wilson did not identify Peet by name and, as noted earlier, her identification of Peet during the lineup occurred after his arrest and is therefore irrelevant to the probable cause determination. While the record shows that Peet was arrested within a few hours of Spencer's arrest, absolutely nothing in the record indicates how the police came to suspect that it was Peet who was with Spencer on the night in question. Moreover, as noted earlier, although Wilson stated that the perpetrators left the scene in a Ford F150 pick-up truck, Peet was arrested while possessing a Dodge Ram pick-up truck. For these reasons, as well as those discussed earlier, I believe that, at the time of Peet's arrest, the police clearly lacked probable cause to believe that he had committed a crime, and that no reasonable jury could find otherwise. I would therefore reverse the district court's order granting Pearson's motion for summary judgment and remand with instructions to enter summary judgment in favor of Peet on Peet's cross-motion for summary judgment.

The dissenting Judge correctly put together the chain of events which led to Peet's warrantless arrest:

1. Detroit had a policy of detaining witnesses to crimes, *Taylor v Detroit, supra.*

2. Pearson testified that he did not know what probable cause existed for Peet's arrest, other than, "[h]e could have been put in the system as wanted in regards to questioning to a homicide if that goes into the system." Peet testified that he was arrested as soon as he acknowledged that he had witnessed the robbery at the Coney Island restaurant.

3. The line-up in question took place after the arrest and could not have been used in the determination of probable cause at the arrest which occurred prior to seeking a warrant and without any applicable exception to the warrant requirement.

The dissent specifically noted held:

> In my opinion, no reasonable jury could find that probable cause existed for Peet's arrest. None of the witness statements, including Wilson's, incriminates Peet. Wilson did not identify Peet by name and, as noted earlier, her identification of Peet during the lineup occurred after his arrest and is therefore irrelevant to the probable cause determination. While the record shows that Peet was arrested within a few hours of Spencer's arrest, absolutely nothing in the record indicates how the police came to suspect that it was Peet who was with Spencer on the night in question. Moreover, as noted earlier, although Wilson stated that the perpetrators left the scene in a Ford F150 pick-up truck, Peet was arrested while possessing a Dodge Ram pick-up truck. For these reasons, as well as those discussed earlier, I believe that, at the time of Peet's arrest, the police clearly lacked probable cause to believe that he had

committed a crime, and that no reasonable jury could find otherwise. I would therefore reverse the district court's order granting Pearson's motion for summary judgment and remand with instructions to enter summary judgment in favor of Peet on Peet's cross-motion for summary judgment.(Appendix E)

D) QUALIFIED IMMUNITY DOES NOT APPLY TO DETECTIVE PEARSON, NOR FULL GOVERNMENTAL IMMUNITY TO THE CITY OF DETROIT.

Preliminarily, there is no doubt that the City of Detroit, during the time in question, maintained a policy of arresting witnesses to crimes in order to coerce them into testifying. The Circuit Court majority maintained that evidence from other cases involving the City were not applicable to the case at bar.

However, it is unlikely that any municipality would simply admit to maintaining a blatantly unconstitutional policy. Plaintiffs submitted the deposition testimony of Sergeant Felix Kirk of the Detroit Police Department, who testified in the case of Taylor v. City of Detroit, 368 F.Supp.2d 676, filed in the Eastern District of Michigan. Kirk testified that the Department was recently forced to change its policy involving "illegal detention of witnesses and the arrest of witnesses." In that case, the court denied the City's motion for summary judgment, finding sufficient evidence that the police department had a "custom or policy of unconstitutional conduct." See Taylor v. City of Detroit, 368 F.Supp.2d 676, 692 (E.D.Mich.2005).

Everything that occurred in the case was indicative of such a policy. Clearly, such testimony, given under oath, at the least creates a question of fact as to the existence of, and operation under, such a policy.

Detective Pearson

The dissent noted five primary reasons in assessing liability to detective Pearson. Specifically, first, it was undisputed that Pearson, an investigator with the Homicide Squad, received this case at 8:00 A.M. following the murder of Byrd, and that he was the sole person in charge of the investigation that culminated in his investigation report and request for an arrest warrant.

Second, while there is no evidence that Pearson himself was physically present when Officer Amos arrested Peet, it is inconceivable that Amos would take it upon himself to arrest Peet without being instructed to do so by Pearson, who was in charge of the investigation, or without Pearson's knowledge and approval. Moreover, Peet was promptly taken by Officer Amos to the police station where Pearson himself was waiting to conduct a lineup that included Peet.

Third, the person in charge of a murder investigation is not expected to be physically present at every arrest made during the course of the investigation, but Pearson's absence does not necessarily relieve him from liability for a wrongful arrest that, even if not directed by him, was obviously approved by him. Fourth, The overwhelming and uncontradicted evidence shows that it was Pearson who was in the commander's seat, the man in charge of the investigation, the person who was waiting for Amos to bring Peet to the police station so that Feanda Wilson could identify Peet in a lineup.

Finally, it was not disputed that Pearson supervised the investigation, noted Peet's arrest in his Progress Notes, and arranged for the lineup promptly after Peet's arrest.(Appendix E)

RELIEF REQUESTED

WHEREFORE, Petitioners respectfully this Honorable Supreme Court GRANT it application for Certiorari and reverse the decision of the Sixth Circuit Court of Appeals and the Eastern District of Michigan.

Dated: December 22, 2007

Kevin Laidler

A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEEMELL SPENCER,
Plaintiff,

v.

CITY OF DETROIT, et al.,
Defendants.
_____/

Case No. 03-71470
Hon. John Corbett O'Meara

OPINION AND ORDER GRANTING DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO DEFENDANT DWIGHT PEARSON

Plaintiff Jeemell Spencer and his cousin Dennis Peet were arrested by the Detroit Police Department and bound over for trial on charges of murder. Both were acquitted after a jury trial. Plaintiff subsequently filed suit against the City of Detroit and a number of Detroit Police Department employees, alleging that he was arrested and detained without probable cause. The defendants filed a joint motion for summary judgment on November 12, 2004. Plaintiff filed a response on December 8, 2004, and Defendants filed a reply on December 21, 2004. Oral argument was heard on January 14, 2005. At the hearing, the court granted summary judgment for the City of Detroit and all individual defendants except for Dwight Pearson. The claims regarding Pearson were taken under advisement An order to that effect was entered on January 19, 2005. The court, having considered the submissions and arguments of the parties, is now prepared to complete its ruling on the defendants' joint motion. For the following reasons, defendants' motion for summary judgment is granted with respect to Dwight Pearson.

Summary Judgment Standard of Review

Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The court must view the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Bender v. Southland Corp.,749 F.2d 1205, 1210-11 (6th Cir. 1984).To create a genuine issue of material fact, the nonmovant must do more than present someevidence on a disputed issue. As the United States Supreme Court stated in Anderson v. LibertyLobby, Inc., 477 U.S. 242, 249-50 (1986),

> There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the[nonmovant's] evidence is merely colorable, or is not significantly probative,summary judgment may be granted.(Citations omitted). See Catrett, 477 U.S. at 322-23; Matsushita Elec. Indus. Co. v. Zenith RadioCorp., 475 U.S. 574, 586-87 (1986)

A nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact. Lucas v. Leaseway Multi Transp. Serv., Inc., 738 F. Supp. 214, 217 (E.D. Mich. 1990), aff'd, 929 F.2d 701 (6th Cir. 1991). Although the nonmoving

party's evidence in opposition to summary judgment need not be of the sort admissible at trial, he must employ proof other than his pleadings and own affidavits to establish the existence of specific triable facts. Ashbrook v. Block, 917 F.2d 918, 921 (6th Cir. 1990).

Background

The facts in this case are disputed, so the court will consider them in the light most favorable to the plaintiff. On April 27, 2000, Peet and Spencer went a Super City Coney Island in Detroit. Peet was driving a blue Dodge pick-up and parked in front of the restaurant, near a red Ford Escort. Reed Byrd was in the passenger seat of the Escort, and restaurant employee Feanda Wilson was allegedly going back and forth between the restaurant and the Escort to smoke marijuana. The plaintiffs entered the restaurant, and Wilson took their orders. Peet prepared a marijuana cigarette, and Spencer attempted to secure a date with Wilson. Spencer gave Wilson hispager number. The plaintiffs exited the restaurant.

Shortly after the plaintiffs exited the restaurant, three men entered a gas station which adjoins the restaurant. One of the three men had a gun. The men robbed a gas station customer named Jmo Bracey of his jacket and some money at gunpoint. The gunman exited the gas station and entered the Coney Island, where he robbed and shot a customer, Leonard Woodward (also referred to as Leonard McGlory). The gunman exited the Coney Island and shot Byrd, who was still sitting in the Escort. Byrd's jacket was stolen. Woodward survived and Byrd died as a result of the shooting. The two suspects without guns encouraged Byrd's murder and aided in the robbery.

Detroit Police arrived and took statements from those claiming to have witnessed the events. Feanda Wilson gave a

statement describing the gunman and his accomplices. Wilson claimed that the man who had given her his pager number told the gunman to shoot Byrd, and that his friend stole Byrd's jacket after the shooting. Wilson further claimed that the two accomplices fled the scene in a blue Ford 150 pick-up.

Three other witnesses made statements on April 28. Robbery victim Jmo Braceydescribed the three perpetrators, and noted that Wilson said the two accomplices had been in the Coney Island and one of them gave her his pager number. Shooting victim Leonard Woodward also made a statement describing the three perpetrators. John Anderson, a gas station customer, described the two accomplices as having a medium complection. Peet and Spencer claim this is exculpatory evidence because they have dark complexions.

Dwight Pearson was the homicide officer in charge of the investigation. Spencer was identified through the pager number he had given to Feanda Wilson. Peet and Spencer were arrested and brought down to the Detroit Police Department on April 28. Once they arrived at the station, Wilson identified both of them in a lineup. Plaintiff claims the lineup was improperly suggestive because Spencer was the only person in his lineup wearing braids.

On April 28, Pearson prepared a request for an arrest warrant for the plaintiff and presented it to the Wayne County Prosecutor's Office. Pearson's investigatory report relied heavily on Wilson's statement and her identification at the lineup. Pearson's report also claimed that witness Jmo Bradley would testify that Peet and Spencer were with the gunman when he was robbed in the gas station. Pearson's report further claimed that witness John Anderson would testify that Peet and Spencer walked into the Amoco gas station with the gunman and robbed him. Plaintiff alleges that he did not go inside the gas station, and the Pearson's

report therefore included misstatements. Plaintiff also claims Pearson omitted exculpatory witnesses from his report. Pearson tendered all then-existing witness statements to the Prosecutor's Office with the arrest warrant request.

Pearson continued to investigate the case. A few days after the plaintiff was arrested, Julian "Doc" Latham told Pearson that Peet and Spencer were innocent. Latham was a homeless person with a drug problem and close ties to Peet and Spencer, whom he called "like family." Latham was present at the Coney Island on the night in question, but did not actually see the robbery or the shooting. Regardless, he claims Peet and Spencer were innocent because he knew them well and knew they wouldn't do such a thing. Latham claims the police locked him up for three or four days in an attempt to get him to change his testimony.

On May 2, 2000, Pearson stated in his progress notes, "After reviewing all statement's [sic] given, Feanda Wilson is the only statement out of place. Setting up polygraph for her 5-3-00 to see if she is lying about the two suspect [sic] the warrant was type [sic] on. Feanda no longer works at Super Coney Island. Fired for stolen money from business." The polygraph never took place. These notes were also turned over to the prosecutor.

On May 4, Jmo Bracey made another statement, claiming that Peet and Spencer were not involved in the incident. He described how some of Peet's friends and family asked him to go to the police and tell them that Peet and Spencer were innocent. Pearson's notes indicate Pearson believed Bracey said someone asked him to lie about both suspects. Bracey told police he was afraid (it's not clear from the record of what he was afraid) and was placed in police protection at the Days' Inn on Jefferson Avenue in Detroit.

A state court held a probable cause hearing on May 24, 2000. Peet and Spencer were both represented by counsel. Feanda Wilson testified. The court was aware that Jmo Bracey and Leonoard Woodward were potential witnesses, but they did not appear at the hearing. District Judge Jimmylee Gray, citing Wilson's testimony, stated:

> The Court finds that there's probable cause to believe that Jeemel Spencer by ordering the shooter to shoot and kill M r. Byrd did, in fact, participate in first degree premeditated murder. . . .
>
> The Court is also of the belief that both Mr. Spencer and Mr. Peet knew what was happening and believe – the Court believes that all three individuals were acting in concert. And the Court finds that there's probable cause to believe that the murder of Mr. Byrd did occur while the armed robbery was occurring and that Mr. Spencer and Mr. Peet participated in the – along with the third person identified with the weapon. . . .
>
> [T]he court believes that both Defendants also participated in the assault with intent to murder as to the person that was shot inside the Coney Island.

Peet and Spencer were bound over for trial. After a jury trial, both were acquitted.

In a deposition taken for this trial, victim Leonard Woodward claimed that Peet and Spencer were not involved in the crime. In another deposition, Jmo Bracey also continued tomaintain that Peet and Spencer were not

involved. Another alleged eyewitness, Marvin Benton, claims in a 2004 deposition that he told police he saw the incident, but the police never contacted him. Benton could not make a positive or negative identification in 2004, but claims he might have been able to immediately following the incident.

Law and Analysis

Plaintiff has filed suit under 42 U.S.C. § 1983. The complaint alleges Defendant Pearson violated the plaintiff's Fourth and Fourteenth Amendment rights by 1) effecting a warrantless search and seizure without probable cause, and 2) maliciously prosecuting and retaliating against the defendant. Defendant Pearson claims that his actions are protected by qualified immunity. The first step in a qualified immunity analysis is to determine whether the defendant violated a constitutional right at all. Hope v. Pelzer, 536 U.S. 730, 736 (2002).

I. Illegal Search and Seizure

The police must have probable cause to arrest to meet the requirements of the Fourth Amendment. The state court held a preliminary hearing and found probable cause existed to bind the plaintiffs over for trial. Normally, collateral estoppel would bar the relitigation of probable cause in a subsequent § 1983 case. See Hinchman v. Moore, 312 F.3d 198, 202 (6th Cir. 2002). The collateral estoppel law of Michigan, the state where the judgment was rendered, governs the judgment's preclusive effect in federal court. Id. Under Michigan law, collateral estoppel does not apply if the parties did not have a full and fair opportunity to litigate the issue in the earlier proceeding. Id. The Sixth Circuit has held that collateral estoppel does not apply in cases where the plaintiff's claim is based on a police officer's supplying false information to establish probable cause. Id. at 203; See also Vakilian v.

Shaw, 335 F.3d 509 (6th Cir. 2003) (holding that an officer can not rely on a judicial determination of probable cause "if that officer knowingly makes false statements and omissions to the judge such that but for these falsities the judge would not have issued the warrant."). This is true even if the state court defendants had the ability to crossexamine witnesses and provide testimony themselves discrediting the police officer's information. Hinchman, 312 F.3d at 203.

Plaintiff claims that Pearson twisted, misrepresented, and falsified witnesses statements, and omitted exculpatory witness statements. There may be enough evidence to create a genuine issue of material fact regarding Pearson's alleged omissions and mischaracterizations regarding Bracey's and Anderson's statements. However, even if a police officer makes false statements or reckless omissions to a court in a preliminary probable cause hearing, if probable cause would have existed in the absence of these false statements or reckless omissions, the plaintiff's cause of action will still not succeed. Vakilian, 335 F.3d at 517; Wilson v. Russo, 212 F.3d 781 (3d Cir. 2000). The court should insert any facts recklessly omitted or delete any falsities, and if there would still be probable cause, the misstatements are deemed immaterial. Wilson, 212 F.3d at 789.

Probable cause to arrest and prosecute is based on the "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person . . . in believing . . . that the suspect has committed . . . an offense." Hinchman, 312 F.3d at 204. Probable cause determinations examine all the facts and circumstances within the officer's knowledge at the time of the arrest. Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000). The United States Supreme Court has held:

> The principle components of a determination of reasonable suspicion or probable cause will

> be the events which first occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact.

Ornelas v. United States, 517 U.S. 690, 696-97 (1996).

A positive identification by an eyewitness standing alone is usually enough to establish probable cause. Ahlers v. Schebil, 188 F.3d 365, 370-71 (6th Cir. 1999); Wilson, 212 F.3d at 790. However, this identification must be a reliable identification. The identification may be unreliable if, at the time of the arrest, there is an apparent reason for the officer to believe that the eyewitness was lying, did not accurately describe what she had seen, or was somehow mistaken. Ahlers, 188 F.3d at 370. Eyewitnesses statements are generally entitled to a presumption of reliability and veracity. Id. In this case, eyewitness Wilson provided a positive identification of Peet and Spencer. Plaintiff claims that Wilson's identification was unreliable because she was smoking marijuana, her view was obstructed by bullet-proof glass and a counter, and because she allegedly stole money from the Coney Island on the night in question. But Plaintiff has not shown that Pearson knew about the alleged marijuana and theft at the time of the arrest, or indeed at any time after the arrest. Pearson did know about Wilson's firing prior to the probable cause hearing, but by that point he had already turned the case over to the prosecutor. The prosecutor received copies of all of Pearson's case notes, including his notation that Wilson was fired for theft. Moreover, it is not clear that the alleged drug use or theft make her statement

unreliable. Plaintiff has not provided any reason why Wilson would falsely accuse him of murder. Plaintiff further claims the lineup was improperly suggestive, but the lineup was not necessary for the probable cause determination. The lineup certainly adds to the evidence, but Wilson's initial statement alone was sufficient to establish probable cause to arrest and detain.

Once evidence sufficient to produce probable cause exists, there is generally not a duty to make a further investigation. Coogan v. City of Wixom, 820 F.2d 170 (6th Cir. 1997); Ahlers, 188 F.3d 371. However, if exculpatory evidence exists, that exculpatory evidence must be considered in determining whether probable cause exists. Ahlers, 188 F.3d at 371-72; Gardenhire, 205 F.3d at 318. In some circumstances, exculpatory evidence might warrant against a finding of probable cause that might have otherwise exist in the absence of the exculpatory evidence. Those circumstances do not exist here. At the time of the arrest, the statements made by the witnesses other than Wilson were not inconsistent with Wilson's identification of Peet and Spencer. If anything, Jmo Bracey's initial statement supported Wilson's statement; he mentioned at the end of his statement that Wilson had the pager number of one of the assailants. The statements Bracey and others gave later claimed that Spencer and Peet were not involved, but at the time of the arrest, Pearson did not have these exculpatory statements. Even once Pearson did have these statements, there was a reasonable question regarding the reliability of the witnesses who came to Peet and Spencer's defense. As such, probable cause to bind them over for trial still existed even after the witnesses came forward.

In this case, the plaintiff's admission that he was present at the restaurant on the night in question coupled with Wilson's statement are sufficient to establish probable cause.

There are three potential time frames when the probable cause analysis could theoretically be different - 1) when the plaintiff was first arrested; 2) when Pearson filled out the investigative report in the warrant request, after Wilson identified Peet and Spencer in lineups; 3) when Pearson's subsequent investigations yielded more allegedly exculpatory evidence. At all three of these points, probable cause to seize the plaintiff existed because of Wilson's eyewitness report.

B. Malicious Prosecution

Plaintiff claims that Pearson maliciously prosecuted him in violation of the both the Fourth Amendment and Due Process Clause of the Fourteenth Amendment. This claim relies heavily on the alleged lack of probable cause. Plaintiffs claim that Pearson did not have probable cause to order them arrested, and that Pearson manufactured probable cause by twisting the witness statements. Because Pearson did have probable cause to arrest them, and because the plaintiffs have not shown Pearson had any malicious motives in his actions, Pearson should be granted summary judgment.

ORDER

Accordingly, **IT IS HEREBY ORDERED** that defendants' November 12, 2004 Motion
for Summary Judgment is **GRANTED** with respect to defendant Dwight Pearson.

s/John Corbett O'Meara
John Corbett O'Meara
United States District Judge
Date: January 31, 2005

B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS PEET,

Plaintiff,

v.

Case No. 03-72480
Hon. John Corbett O'Meara

CITY OF DETROIT, et al.,

Defendants.
_____/

OPINION AND ORDER GRANTING DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO DEFENDANT DWIGHT PEARSON

Plaintiff Dennis Peet and his cousin Jeemell Spencer were arrested by the Detroit Police Department and bound over for trial on charges of murder. Both were acquitted after a jury trial. Plaintiff subsequently filed suit against the City of Detroit and a number of Detroit Police Department employees, alleging that he was arrested and detained without probable cause. The defendants filed a joint motion for summary judgment on November 12, 2004. Plaintiff filed a response on December 8, 2004, and Defendants filed a reply on December 21, 2004. Oral argument was heard on January 14, 2005. At the hearing, the court granted summary judgment for the City of Detroit and all individual defendants except for Dwight Pearson. The claims regarding Pearson were taken under advisement An order to that effect was entered on January 19, 2005. The court, having considered the submissions and arguments of the parties, is now prepared to complete its ruling on the defendants' joint motion. For the following reasons, defendants' motion for

summary judgment is granted with respect to Dwight Pearson.

Summary Judgment Standard of Review

Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The court must view the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Bender v. Southland Corp.,749 F.2d 1205, 1210-11 (6th Cir. 1984).

To create a genuine issue of material fact, the nonmovant must do more than present some evidence on a disputed issue. As the United States Supreme Court stated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986),

> There is no issue for trial unless there is sufficient evidence favoring thenonmoving party for a jury to return a verdict for that party. If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

(Citations omitted). See Catrett, 477 U.S. at 322-23; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). A nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact. Lucas v. Leaseway Multi Transp. Serv., Inc., 738 F. Supp. 214, 217

(E.D. Mich. 1990), aff'd, 929 F.2d 701 (6th Cir. 1991). Although the nonmoving party's evidence in opposition to summary judgment need not be of the sort admissible at trial, he must employ proof other than his pleadings and own affidavits to establish the existence of specific triable facts. Ashbrook v. Block, 917 F.2d 918, 921 (6th Cir. 1990).

Background

The facts in this case are disputed, so the court will consider them in the light most favorable to the plaintiff. On April 27, 2000, Peet and Spencer went a Super City Coney Island in Detroit. Peet was driving a blue Dodge pick-up and parked in front of the restaurant, near a red Ford Escort. Reed Byrd was in the passenger seat of the Escort, and restaurant employee Feanda Wilson was allegedly going back and forth between the restaurant and the Escort to smoke marijuana. The plaintiffs entered the restaurant, and Wilson took their orders. Peet prepared a marijuana cigarette, and Spencer attempted to secure a date with Wilson. Spencer gave Wilson his pager number. The plaintiffs exited the restaurant.

Shortly after the plaintiffs exited the restaurant, three men entered a gas station which adjoins the restaurant. One of the three men had a gun. The men robbed a gas station customer named Jmo Bracey of his jacket and some money at gunpoint. The gunman exited the gas station and entered the Coney Island, where he robbed and shot a customer, Leonard Woodward (also referred to as Leonard McGlory). The gunman exited the Coney Island and shot Byrd, who was still sitting in the Escort. Byrd's jacket was stolen. Woodward survived and Byrd died as a result of the shooting. The two suspects without guns encouraged Byrd's murder and aided in therobbery.

Detroit Police arrived and took statements from those claiming to have witnessed the events. Feanda Wilson gave a statement describing the gunman and his accomplices. Wilson claimed that the man who had given her his pager number told the gunman to shoot Byrd, and that his friend stole Byrd's jacket after the shooting. Wilson further claimed that the two accomplices fled the scene in a blue Ford 150 pick-up.

Three other witnesses made statements on April 28. Robbery victim Jmo Bracey described the three perpetrators, and noted that Wilson said the two accomplices had been in the Coney Island and one of them gave her his pager number. Shooting victim Leonard Woodward also made a statement describing the three perpetrators. John Anderson, a gas station customer, described the two accomplices as having a medium complection. Peet and Spencer claim this is exculpatory evidence because they have dark complexions.

Dwight Pearson was the homicide officer in charge of the investigation. Spencer was identified through the pager number he had given to Feanda Wilson. Peet and Spencer were arrested and brought down to the Detroit Police Department on April 28. Peet claims the police told him that he was a witness to murder when he was arrested. Once they arrived at the station, Wilson identified both of them in a lineup. Plaintiff claims the lineup was improperly suggestive because Peet was much shorter than the other men in his lineup.

On April 28, Pearson prepared a request for an arrest warrant for the plaintiff and presented it to the Wayne County Prosecutor's Office. Pearson's investigatory report relied heavily on Wilson's statement and her identification at the lineup. Pearson's report also claimed that witness Jmo Bradley would testify that Peet and Spencer were with the

gunman when he was robbed in the gas station. Pearson's report further claimed that witness John Anderson would testify that Peet and Spencer walked into the Amoco gas station with the gunman and robbed him. Plaintiff alleges that he did not go inside the gas station, and the Pearson's report therefore included misstatements. Plaintiff also claims Pearson omitted exculpatory witnesses from his report. Pearson tendered all then-existing witness statements to the Prosecutor's Office with the arrest warrant request.

Pearson continued to investigate the case. A few days after the plaintiff was arrested, Julian "Doc" Latham told Pearson that Peet and Spencer were innocent. Latham was a homeless person with a drug problem and close ties to Peet and Spencer, whom he called "like family." Latham was present at the Coney Island on the night in question, but did not actually see the robbery or the shooting. Regardless, he claims Peet and Spencer were innocent because he knew them well and knew they wouldn't do such a thing. Latham claims the police locked him up for three or four days in an attempt to get him to change his testimony.

On May 2, 2000, Pearson stated in his progress notes, "After reviewing all statement's [sic] given, Feanda Wilson is the only statement out of place. Setting up polygraph for her 5-3-00 to see if she is lying about the two suspect [sic] the warrant was type [sic] on. Feanda no longer works at Super Coney Island. Fired for stolen money from business." The polygraph never took place. These notes were also turned over to the prosecutor.

On May 4, Jmo Bracey made another statement, claiming that Peet and Spencer were not involved in the incident. He described how some of Peet's friends and family asked him to go to the police and tell them that Peet and Spencer were innocent. Pearson's notes indicate Pearson

believed Bracey said someone asked him to lie about both suspects. Bracey told police he was afraid (it's not clear from the record of what he was afraid) and was placed in police protection at the Days' Inn on Jefferson Avenue in Detroit.

A state court held a probable cause hearing on May 24, 2000. Peet and Spencer were both represented by counsel. Feanda Wilson testified. The court was aware that Jmo Bracey and Leonoard Woodward were potential witnesses, but they did not appear at the hearing. District Judge Jimmylee Gray, citing Wilson's testimony, stated:

> The Court finds that there's probable cause to believe that Jeemel Spencer by ordering the shooter to shoot and kill M r. Byrd did, in fact, participate in first degree premeditated murder. . . .
>
> The Court is also of the belief that both Mr. Spencer and Mr. Peet knew what was happening and believe – the Court believes that all three individuals were acting in concert. And the Court finds that there's probable cause to believe that the murder of Mr. Byrd did occur while the armed robbery was occurring and that Mr. Spencer and Mr. Peet participated in the – along with the third person identified with the weapon. . . .
>
> [T]he court believes that both Defendants also participated in the assault with intent to murder as to the person that was shot inside the Coney Island. Peet and Spencer were bound over for trial. After a jury trial, both were acquitted.

In a deposition taken for this trial, victim Leonard Woodward claimed that Peet and Spencer were not involved in the crime. In another deposition, Jmo Bracey also continued to maintain that Peet and Spencer were not involved. Another alleged eyewitness, Marvin Benton, claims in a 2004 deposition that he told police he saw the incident, but the police never contacted him. Benton could not make a positive or negative identification in 2004, but claims he might have been able to immediately following the incident.

Law and Analysis

Plaintiff has filed suit under 42 U.S.C. § 1983. The complaint alleges Defendant Pearson violated the plaintiff's Fourth and Fourteenth Amendment rights by 1) effecting a warrantless search and seizure without probable cause, and 2) maliciously prosecuting and retaliating against the defendant. Defendant Pearson claims that his actions are protected by qualified immunity. The first step in a qualified immunity analysis is to determine whether the defendant violated a constitutional right at all. Hope v. Pelzer, 536 U.S. 730, 736 (2002).

I. Illegal Search and Seizure

The police must have probable cause to arrest to meet the requirements of the Fourth Amendment. The state court held a preliminary hearing and found probable cause existed to bind the plaintiffs over for trial. Normally, collateral estoppel would bar the relitigation of probable cause in a subsequent § 1983 case. See Hinchman v. Moore, 312 F.3d 198, 202 (6th Cir. 2002).

The collateral estoppel law of Michigan, the state where the judgment was rendered, governs the judgment's preclusive effect in federal court. Id. Under Michigan law,

collateral estoppel does not apply if the parties did not have a full and fair opportunity to litigate the issue in the earlier proceeding. Id. The Sixth Circuit has held that collateral estoppel does not apply in cases where the plaintiff's claim is based on a police officer's supplying false information to establish probable cause. Id. at 203; See also Vakilian v. Shaw, 335 F.3d 509 (6th Cir. 2003) (holding that an officer can not rely on a judicial determination of probable cause "if that officer knowingly makes false statements and omissions to the judge such that but for these falsities the judge would not have issued the warrant."). This is true even if the state court defendants had the ability to crossexamine witnesses and provide testimony themselves discrediting the police officer's information. Hinchman, 312 F.3d at 203. Plaintiff claims that Pearson twisted, misrepresented, and falsified witnesses statements, and omitted exculpatory witness statements.

There may be enough evidence to create a genuine issue of material fact regarding Pearson's alleged omissions and mischaracterizations regarding Bracey's and Anderson's statements. However, even if a police officer makes false statements or reckless omissions to a court in a preliminary probable cause hearing, if probable cause would have existed in the absence of these false statements or reckless omissions, the plaintiff's cause of action will still not succeed. Vakilian, 335 F.3d at 517; Wilson v. Russo, 212 F.3d 781 (3d Cir. 2000). The court should insert any facts recklessly omitted or delete any falsities, and if there would still be probable cause, the misstatements are deemed immaterial. Wilson, 212 F.3d at 789. Probable cause to arrest and prosecute is based on the "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person . . . in believing . . . that the suspect has committed . . . an offense." Hinchman, 312 F.3d at 204. Probable cause determinations examine all the facts and circumstances within the officer's knowledge at

the time of the arrest. Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000). The United States Supreme Court has held:

> The principle components of a determination of reasonable suspicion or probable cause will be the events which first occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact.

Ornelas v. United States, 517 U.S. 690, 696-97 (1996).

A positive identification by an eyewitness standing alone is usually enough to establish probable cause. Ahlers v. Schebil, 188 F.3d 365, 370-71 (6th Cir. 1999); Wilson, 212 F.3d at 790. However, this identification must be a reliable identification. The identification may be unreliable if, at the time of the arrest, there is an apparent reason for the officer to believe that the eyewitness was lying, did not accurately describe what she had seen, or was somehow mistaken. Ahlers, 188 F.3d at 370. Eyewitnesses statements are generally entitled to a presumption of reliability and veracity. Id. In this case, eyewitness Wilson provided a positive identification of Peet and Spencer. Plaintiff claims that Wilson's identification was unreliable because she was smoking marijuana, her view was obstructed by bullet-proof glass and a counter, and because she allegedly stole money from the Coney Island on the night in question. But Plaintiff has not shown that Pearson knew about the alleged marijuana and theft at the time of the arrest, or indeed at any time after the arrest. Pearson did know about Wilson's firing prior to

the probable cause hearing, but by that point he had already turned the case over to the prosecutor. The prosecutor received copies of all of Pearson's case notes, including his notation that Wilson was fired for theft. Moreover, it is not clear that the alleged drug use or theft make her statement unreliable. Plaintiff has not provided any reason why Wilson would falsely accuse him of murder. Plaintiff further claims the lineup was improperly suggestive, but the lineup was not necessary for the probable cause determination. The lineup certainly adds to the evidence, but Wilson's initial statement alone was sufficient to establish probable cause to arrest and detain.

Once evidence sufficient to produce probable cause exists, there is generally not a duty to make a further investigation. Coogan v. City of Wixom, 820 F.2d 170 (6th Cir. 1997); Ahlers, 188 F.3d 371. However, if exculpatory evidence exists, that exculpatory evidence must be considered in determining whether probable cause exists. Ahlers, 188 F.3d at 371-72; Gardenhire, 205 F.3d at 318. In some circumstances, exculpatory evidence might warrant against a finding of probable cause that might have otherwise exist in the absence of the exculpatory evidence. Those circumstances do not exist here. At the time of the arrest, the statements made by the witnesses other than Wilson were not inconsistent with Wilson's identification of Peet and Spencer. If anything, Jmo Bracey's initial statement supported Wilson's statement; he mentioned at the end of his statement that Wilson had the pager number of one of the assailants.The statements Bracey and others gave later claimed that Spencer and Peet were not involved, but at the time of the arrest, Pearson did not have these exculpatory statements. Even once Pearson did have these statements, there was a reasonable question regarding the reliability of the witnesses who came to Peet and Spencer's defense. As

such, probable cause to bind them over for trial still existed even after the witnesses came forward.

In this case, the plaintiff's admission that he was present at the restaurant on the night in question coupled with Wilson's statement are sufficient to establish probable cause. There are three potential time frames when the probable cause analysis could theoretically be different - 1) when the plaintiff was first arrested; 2) when Pearson filled out the investigative report in the warrant request, after Wilson identified Peet and Spencer in lineups; 3) when Pearson's subsequent investigations yielded more allegedly exculpatory evidence. At all three of these points, probable cause to seize the plaintiff existed because of Wilson's eyewitness report.

II. Malicious Prosecution

Plaintiff claims that Pearson maliciously prosecuted him in violation of the both the Fourth Amendment and Due Process Clause of the Fourteenth Amendment. This claim relies heavily on the alleged lack of probable cause. Plaintiffs claim that Pearson did not have probable cause to order them arrested, and that Pearson manufactured probable cause by twisting the witness statements. Because Pearson did have probable cause to arrest them, and because the plaintiffs have not shown Pearson had any malicious motives in his actions, Pearson should be granted summary judgment.

ORDER

Accordingly, **IT IS HEREBY ORDERED** that defendants' November 12, 2004 Motion
for Summary Judgment is **GRANTED** with respect to defendant Dwight Pearson.

s/John Corbett O'Meara

John Corbett O'Meara
United States District Judge
Date: January 31, 2005

C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEEMELL SPENCER,

Plaintiff,

USDC Case No. 03-71470
USDC Hon. John Corbett O'Meara
Magistrate Judge Scheer

v.

CITY OF DETROIT, et al.,

Defendants.
_____/

ORDER GRANTING IN PART DEFENDANTS CITY OF DETROIT AND THE INDIVIDUALLY NAMED DEFENDANTS (with the exception of DWIGHT PEARSON) MOTION FOR SUMMARY JUDGMENT

At a session of said court held in the City of Detroit County of Wayne, Michigan on January 19, 2005

PRESENT HON JOHN CORBETT O'MEARA

This matter having come before this Court on **Defendant's Motion for Summary Judgment** pursuant to Federal Rule of Civil Procedure 56, briefs having been filed and the Court hearing arguments from plaintiff and defendants, all parties having appeared by counsel and the Court being sufficiently apprised on the premises,

IT IS HEREBY ORDERED, that Defendant CITY OF DETROIT and the Individually-Named Defendants (with

the exception of Dwight Pearson) *Motion for Summary Judgment* is hereby GRANTED with prejudice.

IT IS FURTHER ORDERED defendant DWIGHT PEARSON'S *Motion for Summary Disposition* is hereby taken under advisement.

Dated: January 19, 2005 /S/_____

John Corbett O'Meara

Circuit Court Judge

D

United States Court of UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS PEET,

Plaintiff,

USDC Case No. 03-72480
USDC Hon. John Corbett O'Meara
Magistrate Judge Scheer

v.

CITY OF DETROIT, et al.,

Defendants.
_____/

ORDER GRANTING IN PART DEFENDANTS CITY OF DETROIT AND THE INDIVIDUALLY NAMED DEFENDANTS (with the exception of DWIGHT PEARSON) MOTION FOR SUMMARY JUDGMENT

At a session of said court held in the City of Detroit County of Wayne, Michigan on January 20, 2005

PRESENT HON JOHN CORBETT O'MEARA

This matter having come before this Court on **Defendant's Motion for Summary Judgment** pursuant to Federal Rule of Civil Procedure 56, briefs having been filed and the Court hearing arguments from plaintiff and defendants, all parties having appeared by counsel and the Court being sufficiently apprised on the premises,

IT IS HEREBY ORDERED, that Defendant CITY OF DETROIT and the Individually-Named Defendants (with

the exception of Dwight Pearson) *Motion for Summary Judgment* is hereby GRANTED with prejudice.

IT IS FURTHER ORDERED defendant DWIGHT PEARSON'S *Motion for Summary Disposition* is hereby taken under advisement.

Dated: January 19, 2005 /S/_____

John Corbett O'Meara

Circuit Court Judge

E

United States Court of Appeals, Sixth Circuit.

Dennis PEET; Jeemell Spencer,

Plaintiffs-Appellants,

v.

CITY OF DETROIT; Dwight Pearson; Lovier, Sergeant; Sullivan, Sergeant; Howard Phillips; Petersen, Sergeant; Deborah Nix; Jackson, Lieutenant; J. Fisher; Barbara Simon; William Rice; Charles Howard; Mark Amos; Ed Rudoni; Visbara, Sergeant; Catherine Adams, Jointly and Severally, Defendants-Appellees.

Nos. 05-1371, 05-1373.

Argued: Aug. 1, 2006.

Decided and Filed: Sept. 25, 2007.

OPINION

ROGERS, Circuit Judge.

This appeal is composed of two related cases. Both cases are actions under 42 U.S.C. § 1983 seeking damages from individual Detroit police officers for their alleged unconstitutional seizure and malicious prosecution of the plaintiffs. The plaintiffs, Dennis Peet and Jeemell Spencer, further seek to hold the City of Detroit liable for the officers' alleged constitutional violations. On appeal, the plaintiffs seek to overturn the district court's grant of summary judgment in favor of Dwight Pearson and the City of Detroit. For the reasons given below, we affirm.

I.

On the night of April 27, 2000, Detroit police officers Robert Petersen and Charles Howard responded to a call reporting shots fired in progress at the Coney Island restaurant located at 12521 Mack Avenue in Detroit. When they arrived, the officers discovered Reed Byrd *559 suffering from a gunshot wound to the abdomen. Paramedics arrived and transported Byrd to the hospital, where he died at 11:31 p.m. The Wayne County Medical Examiner's Office ruled Byrd's death a homicide. When the officers arrived at the scene of the shooting, they also discovered Leonard McGlory, who had suffered multiple gunshot wounds to his legs. McGlory was transported to the hospital for treatment.

Investigator Pearson of the Detroit police conducted an investigation to determine the identity of the shooter and any accomplices. Investigator Pearson identified the plaintiffs, Dennis Peet and Jeemell Spencer, as suspected accomplices by relying, primarily, on Spencer's pager number, which an eyewitness, Feanda Wilson, provided. The day after the shooting, on April 28, 2000, the police took Peet and Spencer into custody for questioning and put them in a live line-up to see whether witnesses could identify Peet and Spencer. Wilson identified them as accomplices of the murderer. Peet and Spencer remained in jail from April 28, 2000, until their acquittal of all charges on March 28, 2001.

A. Information That Police Had Prior To Taking Peet and Spencer Into Custody

The record contains the following evidence as to what the police knew prior to taking Peet and Spencer into custody. John Anderson, who was robbed by the gunman and his accomplices on the night of the shooting, gave a statement to the Detroit police early the next morning at 12:55 a.m. Anderson was "at the gas station" near the Coney Island restaurant "waiting [in line] to pay for my gas" when three men walked in and acted like "they going to buy something." Two of the men stood near Anderson. One of the men yelled at Anderson, "Get that thing." Then, "the other guy that was standing next to me pulled out a gun. I looked at the other guy then the guy said, 'B[* * *] you know what I mean.' " Anderson then gave the man his money, a total of $125. Anderson subsequently opened the gas station door and ran to his car. As he pulled away in his car, he "heard a gunshot." In total, Anderson heard two gunshots between 10:15 p.m. to 10:30 p.m. on April 27, 2000.

When asked for a description of the men in the gas station who stood near him, Anderson described the first as a black male aged 20 to 25, who was 5'9" tall and weighed 165 to 170 pounds. The man wore a gray pullover jacket with a hood and gray jogging pants. Anderson described the second man as a black male, aged 18 to 25, who was 5'7" to 5'8" tall and weighed 160 pounds. He wore a red pullover jacket. Anderson did not provide a description of the third person allegedly involved.

Jmo Bracey, who was robbed by the same three men that victimized Anderson on the night of the shooting, gave a statement to the Detroit police early the next morning at 3:05 a.m. Bracey recounted what he saw and heard the previous night. Bracey and his friend Leonard McGlory

drove to the Coney Island restaurant and ordered food. Bracey walked to the nearby gas station to buy a cigar. McGlory waited for the food at the restaurant. "When I walked out of the Coney Island," Bracey told the police, "3 guys walked up behind me, like from around the corner of the building." Bracey "saw one guy reach up inside his coat like he was getting a gun out, and I figured I was about to get robbed." Bracey told the police:

Just then a crackhead called out to the guy and got his attention, and I got inside the gas station before he got his *560 gun out. I told the guy behind the counter that I was about to get robbed, and I took my gold chain off and put it in my sock. Then the 3 guys came in and the one guy took his gun out and put it up to my neck. He says, "Give me your chain and your jacket." I told him that I gave my chain to the guy behind the counter, so the guy with the gun just took my coat.... One of the other guys took my money $100 (5-$20's) out of my pocket. The third guy was waiting by the door, like watching out. The guy behind the counter locked the door where they was inside, but after they robbed me, they snatched the door loose and got out.

...

I saw 2 of them, I think, run up into the Coney Island, and I heard some shots while they were inside, that had to be when they shot Leonard [McGlory]. Then they ran out and the one with the gun shot 3 times into the front windshield of the red car [in front of the Coney Island], and shot the guy inside the car. Then they took off and ran around the corner of the Coney Island back toward the car wash and Anderson Street. I didn't see them any more after that. I checked on Leonard [McGlory], and he was laying on the

floor under the chair back of the video game in the Coney Island, and he was shot in the legs.

Bracey transported McGlory to Riverview Hospital for treatment. McGlory told Bracey that the men had robbed him.

Bracey told the police that he had never seen the men before. Bracey described the gunman as a black male aged 22, who was 5'6" to 5'7" tall, weighed 160 pounds, and had light brown skin and a short-trimmed beard. The gunman wore his hair in braids and was wearing a gray "sweater-jacket, like a spring jacket, and black pants."

Bracey described the man who took his $100 as a black male aged 20 to 25, who was 5'6" tall, weighed 150 pounds, and had "dark skin." Bracey described the third man, the one who stood watch, as a black male of the same age as the man who took his money. The third man stood six feet tall, was thin, and had "brown skin." Bracey said that only the first man had a gun.

Bracey also said that the "girl who worked in the Coney Island," presumably Feanda Wilson, told him that the men had been in the restaurant prior to the shooting and that a friend of the shooter's had given her his number.

Feanda Wilson gave a statement to Detroit police in the early morning after the shooting. Wilson described the events that led up to the shooting. A little before 10:00 p.m., Wilson was at the Coney Island restaurant sitting in her friend Reed Byrd's car, a red Ford Escort parked just outside the restaurant's door. While conversing with Byrd in his car,

Wilson saw "a black guy wearing a light gray jogging suit" walk past and head toward the nearby gas station. Wilson then went to work behind the counter at the restaurant. Moments later, the man in the gray jogging suit entered the restaurant. The man in the jogging suit looked out the window. Wilson then saw two men outside "next to [Byrd's] car, one on each side of it." Wilson

saw one of the guys open the driver's door and grab my friend and grabbed his black jacket and his red/white/blue shirt off [of] him. My friend was trying to back up and while this was taking place, this guy inside the restaurant with the gray jogging suit went over to a customer who was sitting next to the video game. He told the customer, "What the f[* * *] are you looking at"? *561 The customer said, "I ain't seen nothing". The guy said, "Naw n [* * *]a, you saw something," then he just started shooting. Then the guy with the jogging suit [went] outside and over to my friend's car where the other guys are trying to grab my friend out of his car. The guy at the driver's door said, "Get this mother f[* * *]r too." Then, the guy with the jogging suit just starts shooting at my friend. Then he runs around by the garbage cans. The two other guys who were at the car got into a dark blue Ford F 150 pickup, late 80's, early 90's, and backed up, then took off.

Wilson described the man in the jogging suit as a black male, aged 20 to 23, who was 5'7" tall and weighed 165 to 170 pounds with a light complexion. The man wore his hair in braids and also wore a white shirt. Wilson said that the man shot the patron in the restaurant and her friend in the car about three times each.

Wilson described the man who was at the driver's side door of her friend's car as a black male, aged 20 to 25, who was 5′4″ to 5′5″ tall and weighed 170 pounds with a dark complexion. The driver's side man wore his hair in braids and also had a mustache. Wilson reported that the man wore a leather jacket and dark pants. Earlier, the driver's side man had "been in the restaurant and gave me his phone number, it was 232-0235 or 6235."

Wilson described the man who approached the car from the passenger's side as a black male, aged 20 to 25, who was 5′8″ tall, weighed 180 pounds, and had a light complexion. The passenger's side man wore his hair "low cut," and that night had worn a gray, hooded sweatshirt and light-colored pants. When asked if she had seen any of these people before, Wilson replied "Yes." The two had ordered food earlier that night and had eaten their food in the getaway truck while talking.

In addition to this statement given the morning after the shooting, Wilson also spoke with Officer Petersen at the scene of the crime right after the shooting occurred. A police report taken at 9:50 p.m. on April 27 listed Feanda Wilson as the person reporting the offense. The report is not consistent with certain portions of Wilson's account given early the next morning. For instance, the police report identified only two perpetrators, whereas Wilson identified three in her later statement. The police report also confused Reed Byrd with Leonard McGlory, stating that complainant # 1 (identified as Reed Byrd in the report's opening) was shot inside the restaurant, while complainant # 2 (identified as McGlory) was reported as having been shot in the red car outside the restaurant. Wilson's statement the following morning did not confuse Byrd and McGlory. The police

report did not attribute any of its contents to Wilson specifically, and the report identified four other witnesses who might have been sources for the report. It also contained information that Wilson almost certainly did not provide, such as the vehicle identification number of Byrd's car. Petersen signed the report, and it does not contain Wilson's signature or any other indicator of its adoption by Wilson.

The police located and identified Spencer on April 28 by using Spencer's pager number, which they obtained from Wilson, and took him into custody. The record, however, gives no indication how the police initially came to know of Peet's relevance to the shooting. Apparently, the police also learned of Peet in the course of tracking down Spencer using the pager number. When they approached Peet, he identified himself to Officer Mark Amos as Dennis Peet, showed the officer identification, and admitted to having witnessed a crime that had been committed at the Coney Island *562 restaurant. The police then told Peet that he "was a witness to the murder of Reed Byrd," and demanded that he participate in the police investigation of the crime. Officer Amos told Peet that he was not under arrest but nevertheless handcuffed him and drove him downtown in a police car, despite his protestations and his preference to be driven by family members.

B. Events After Police Took Peet and Spencer Into Custody

That evening, Peet and Spencer were put into separate line-ups to see whether Wilson could identify them as the murderer's accomplices. At the line-up, Wilson identified both Peet and Spencer as the shooter's accomplices. Spencer's line-up occurred at 5:00 p.m., while Peet's line-up

occurred at 7:00 p.m. According to the deposition of Officer J. Fisher, who commented on a photograph of Peet's line-up at Fisher's deposition, Peet was the second shortest of six participants in Peet's line-up. Officer Fisher further testified, based on a photograph of Spencer's line-up, that it looked like Spencer wore his hair in braids, but added, "It's hard to see." Officer Fisher did not say in his deposition that others in the line-up wore their hair differently than Spencer.

Following Wilson's identification of Peet and Spencer on April 28, 2000, Investigator Pearson prepared an Investigator's Report for both Spencer and Peet, which Investigator Pearson completed at around 8:00 p.m. A judge subsequently signed an arrest warrant for Peet and Spencer, whom prosecutors later charged. On May 24, 2000, Peet and Spencer appeared at a preliminary hearing where a state judge determined that probable cause existed to hold them until trial on charges of first degree murder.

Meanwhile, evidence in the case continued to develop in a manner that, on balance, tended to exculpate Peet and Spencer. The police took a statement from McGlory at the hospital on May 2, 2000, recounting what he saw and heard the evening of April 27. Two days later, on May 4, 2000, the police took a second statement from Jmo Bracey. Neither of these witnesses provided information linking Peet or Spencer to the crime. Following the April 28 arrest of Peet and Spencer, Investigator Pearson conducted additional line-ups involving the plaintiffs, none of which produced positive identifications of Peet or Spencer as suspects.

Investigator Pearson wrote in his notes on May 2 at 8:00 p.m., "Feanda Wilson is the only statement out of place. Setting up polygraph for her for 5-3-00 to see if she is lying

about the two suspect[s].... Feanda no longer works at Super Coney Island. Fired for stolen money from business." On June 9, 2000, the Detroit police completed a test for fingerprints on Byrd's red Escort. No print impressions matched the prints of Byrd, Peet, or Spencer.FN1

FN1. Jmo Bracey was deposed on September 1, 2004, in connection with this civil suit. Bracey said that after he gave his first statement to the police, they locked him up and told him that if he did not give them information they would hold him. Bracey asserted in his deposition that after he told the police that Peet and Spencer were innocent, Investigator Pearson locked him up "because they told me I was lying. They thought I was holding evidence, lying to them." This line of questioning in Bracey's deposition regarding the police's alleged threats against him was composed almost entirely of leading questions by counsel for the plaintiffs. Opposing counsel objected repeatedly, but counsel for the plaintiffs retorted, "I can lead any way I want," and, "Go ahead," get a protective order. Counsel for the plaintiffs said to opposing counsel, "You can have a continuing objection on leading, how is that?"

In a deposition taken for this civil suit, Darryl Williams, a witness to the incident at the Coney Island restaurant, testified that the police arrested and locked him up without charges so that they could question him about the incident at Coney Island. Williams also stated that the police directed him to provide the testimony they "wanted to hear" or he would be held longer. Julian Latham, another witness, similarly testified in his deposition that he was arrested as a witness and that the police "coerce[d] me to say that" Peet and Spencer committed the crimes at the Coney Island. Latham said that because the police disliked his testimony exonerating the plaintiffs, the police locked him up and held him for three days, threatening to confine him until he told

the "truth" that Peet and Spencer were guilty. Latham said that Investigator Pearson threatened to charge him with murder after he refused to change his story.

*563 Peet and Spencer remained in jail from April 28, 2000, until their acquittal of all charges on March 28, 2001.

C. Procedural History

In April 2002, Peet brought his suit in Michigan state court, but defendants removed the case to the United States District Court for the Eastern District of Michigan. Peet asserted § 1983 claims based on constitutional violations, including arrest without probable cause and malicious prosecution, as well as state-law claims. (The district court later remanded the state law claims.) Shortly after the filing of Peet's lawsuit, Spencer brought his own identical lawsuit in the Eastern District of Michigan.

Following discovery, all parties moved for summary judgment. The district court denied the plaintiffs' summary judgment motion but granted summary judgment in favor of the defendants in two steps. First, on January 19, 2005, the district court granted the defendants' motions for summary judgment as to the individual officers except Investigator Pearson, and granted summary judgment in favor of Detroit on the municipal liability claims. The district court took the defense motions for summary judgment under advisement as to Investigator Pearson. Second, on January 31, 2005, the district court issued opinions and orders in both the cases of Peet and Spencer granting the defendants' motions for summary judgment as to Investigator Pearson. This appeal followed.

II.

Reviewing de novo, we affirm the district court's grant of summary judgment to all defendants as to Spencer's suit, because no reasonable juror could find that probable cause did not support Spencer's arrest. In his brief, Spencer alleges one constitutional violation with respect to his arrest: he claims that it was unsupported by probable cause. Confining our review to the central issue raised by Spencer, we affirm because probable cause existed to arrest him for the robbery of Reed Byrd.

A.

[1] The police had probable cause to believe that Spencer had robbed Reed Byrd at Coney Island on April 27. Officer Amos consequently had probable cause to effect Spencer's arrest when the police took Spencer into custody prior to the police line-up. In particular, no reasonable juror could disagree that the police could have reasonably believed that Spencer had robbed Reed Byrd, based on Feanda Wilson's knowledge of Spencer's pager number, combined with her statement that the owner of the pager participated in taking Byrd's coat by force.

In Beck v. Ohio, the Supreme Court held that probable cause exists when the police have "reasonably trustworthy information [that is] sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense" based on "the facts and circumstances*564 within [the police's] knowledge" at the moment in question. 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). No reasonable juror could disagree that

the evidence supplied by Wilson made it reasonable to believe that Spencer had committed robbery in connection with the forceful theft of Byrd's coat, thus supplying probable cause to arrest Spencer on felony charges on April 28 before the line-up. Wilson told the police in her early-morning April 28 statement that the night before she saw two men approach Byrd's car on either side and take his coat by force. Wilson saw the man on the driver's side of Byrd's car "open the driver's door and grab [Byrd] and grabbed his black jacket and his red/white/blue shirt off [of] him." Wilson said that both men then tried to "grab" Byrd "out of his car."

Wilson's eye witness statement is trustworthy information justifying a reasonable belief that these two men robbed Byrd. See Beck, 379 U.S. at 91, 85 S.Ct. 223 (trustworthy information creates probable cause); Ahlers v. Schebil, 188 F.3d 365, 370 (6th Cir.1999) (holding that firsthand observations are entitled to a presumption of reliability and veracity). One of the men grabbed Byrd's jacket, thereby depriving Byrd of his property by force. Both men laid their hands on Byrd to remove him from the car, thereby committing robbery.

In addition, the police also had probable cause to believe that Spencer was one of these two robbers, based on Wilson's knowledge of Spencer's pager number. Wilson told police that the robber who approached the driver's side of Byrd's car had "been in the restaurant and gave me his phone number, it was 232-0235 or 6235." It is uncontested that the pager number belonged to Spencer and that the number led the police directly to Spencer. Based on these facts, the police had probable cause to arrest Spencer for robbing Reed Byrd of his coat.

Moreover, other signed witness statements in the record available to Investigator Pearson around the time of the arrest-for example, Jmo Bracey's and John Anderson's statements on April 28-do not materially disagree with Wilson's April 28 witness statement and thus did not undermine the probable cause to arrest Spencer. To the contrary, Bracey's and Anderson's accounts of the robbery and shooting agree with Wilson's account in some important respects; for instance, both Bracey and Wilson said that one of the gunman's accomplices had a dark complexion. Wilson said the first accomplice looked 20 to 25 years old; Bracey's estimate was exactly the same. Wilson said the first accomplice was 5′4″ to 5′5″ and weighed 170 pounds; Bracey's similar (but slightly different) recollection was 5′6″ and 150 pounds. Anderson, also, similarly remembered one of the accomplices as being 5′7″ tall and weighing 160 pounds. A line-by-line comparison of the three accounts is not necessary. The three accounts are not identical, but their differences are minor and are of the sort to be expected when different eye witnesses recollect the same event. Overall, the accounts resemble each other adequately to justify a reasonable officer's belief in Wilson's account in light of Anderson's and Bracey's accounts, and Spencer does not argue that inconsistencies within Wilson's statement undercut her credibility such that a reasonable juror could find that there was no probable cause to justify Spencer's arrest.

B.

Moreover, the evidence that emerged after the arrest, such as statements by witnesses Bracey and McGlory, Investigator Pearson's doubts about Wilson's credibility, and the alleged

suggestiveness of *565 the police line-up, do not aid Spencer's argument that probable cause did not support his arrest. This post-arrest evidence does not show that probable cause was lacking on April 28, when the police arrested Spencer. The Supreme Court has held that probable cause determinations must be evaluated according to the information the police knew at the moment of the challenged conduct, not information learned for the first time afterwards. See Beck, 379 U.S. at 91, 85 S.Ct. 223. The statements that Bracey and McGlory made to the police after April 28, Investigator Pearson's post-arrest doubts about Wilson's credibility, and the line-up are therefore irrelevant to the probable cause issue here, because they occurred after Spencer had already been arrested.

[2] Also regarding post-arrest evidence, Spencer further argues that the police had a duty to release him from jail the moment that new, exculpatory evidence came to light. When subsequent developments disprove the correctness of a previous police determination that probable cause exists, the argument goes, the police no longer have justification under the Fourth Amendment to continue the incarceration, and must release the suspect. Spencer cites no authority articulating this principle as a Fourth Amendment obligation. It lacks support in this circuit's case law. Nor does Spencer offer any rationale from cases or other authority that would warrant a court-imposed requirement on police to release suspects the moment sufficiently exculpatory evidence emerges.

We note that policy does not support such a new development in the law. Such a rule would give investigators the responsibility to reevaluate probable cause constantly with every additional witness interview and scrap

of evidence collected. Moreover, as investigations progress, the strength of evidence against a suspect may frequently change. Some released suspects would be rearrested when further inculpatory evidence emerged and showed that probable cause existed after all. And in lengthy, close cases these suspects might be re-released, and then re-rearrested, and so on.FN2

FN2. The dissent argues that authorities violated Spencer's and Peet's constitutional rights by filing a misleading request for a warrant. In their complaints, however, Spencer and Peet do not raise the dissent's theory that deficiencies in the warrant request amounted to an unconstitutional arrest. Moreover, the district court certainly did not think that Spencer and Peet were raising the dissent's theory, presumably because (to the extent that Spencer and Peet raised the theory at all below) they mentioned the discrepancies in the warrant request to prove that officers lacked probable cause for the initial arrest.

Assuming that the argument is properly before us, the dissent's theory has significant problems. The first two problems are temporal. First, the dissent relies on information that Pearson obtained after he submitted the warrant request to suggest that Pearson always doubted whether probable cause existed. The evidence, however, shows that Pearson submitted the warrant request on the day after the murder, when signs suggested Spencer and Peet's culpability, and the record does not show that authorities questioned their case after the initial arrest but before authorities submitted the warrant request. The dissent points to Pearson's deposition statement that he "might have had doubts" about Wilson's truthfulness before the warrant was signed, but even if Pearson had doubts before the warrant was signed, Pearson's statement does not indicate that those doubts existed before the warrant request was submitted.

Second, the dissent faults the investigators for mentioning Wilson's eyewitness identification in their warrant request. While it is true that Wilson identified Spencer and Peet after the initial arrests, her eye-witness identification undermines Spencer's and Peet's claim that there was no probable cause at the time that Pearson submitted the warrant request. In essence, the dissent faults authorities for failing to include post- warrant exculpatory evidence but then faults authorities for including post- arrest incriminating evidence. In this case, there was probable cause at the time of the initial arrest, and the evidence after the arrest but before authorities submitted the warrant request did not clearly exonerate Spencer and Peet. Third, the dissent demands a level of perfection that would be difficult for most police departments to meet. Undoubtedly, the magistrate judge would have benefitted from a more precise warrant request that clearly delineated what each witness would say and differences between similarly looking cars (assuming that the witnesses could provide consistent and clear descriptions in a situation like this one). Such precision, where there is probable cause to justify an arrest, is not a constitutional requirement.

C.

[3] The district court also properly granted summary judgment to the officers as to Spencer's claim for malicious prosecution. With regard to that claim, Spencer has the problem of the judicial determination of probable cause following the evidentiary preliminary hearing. While that determination has no preclusive effect if there is evidence that the claim of malicious prosecution is based on a police officer's supplying false information to establish probable cause, Hinchman v. Moore, 312 F.3d 198, 202-03 (6th

Cir.2002), there is no evidence in this record that Investigator Pearson or the county prosecutor or anyone else supplied the magistrate judge at that hearing with false information to establish probable cause. To the contrary, the transcript of the preliminary examination in the record shows that the only defense argument made was the alleged insufficiency of the evidence to support the charges, and that argument did not rely on any allegation that false information had been supplied.

Because Spencer has not shown that the state judge relied on false information to determine that probable cause existed to bind Spencer over for trial, Spencer is precluded from relitigating the matter on a theory of malicious prosecution in this § 1983 suit. See, e.g., Buttino v. City of Hamtramck, 87 Fed.Appx. 499, 502-05 (6th Cir.2004).

D.

[4] The conclusion that Spencer's arrest was supported by probable cause also requires affirmance of the district court's grant of summary judgment in favor of the City as to Spencer's suit. Since the police had probable cause to arrest Spencer, the officers did not commit the constitutional wrong that Spencer's suit alleges. Consequently, the City of Detroit cannot be held liable under § 1983 for police conduct that inflicts no constitutional injury. See City of Los Angeles v. Heller, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (per curiam) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.").

The grant of summary judgment to the City as to Spencer's suit was proper.

III.

The district court also properly granted summary judgment as to Peet's suit against the officers. First, Peet only appeals the district court order dismissing the complaint against Pearson. Peet does not challenge the district court order dismissing the complaint against Officer Amos, and we do not address whether a reasonable juror could find that Officer Amos arrested Peet without probable cause. Second, the record does not reflect that Pearson participated in the arrest of Peet. His deposition says that he did not, his progress notes do not mention it, and we are directed to no contrary testimony. *567 As a result, we do not need to engage in speculation as to why Officer Amos arrested Peet or what role Pearson might have played. Finally, for the reasons above regarding Spencer's claim for malicious prosecution, it was proper for the district court to grant summary judgment with respect to Peet's malicious prosecution claim.

The district court also properly granted summary judgment to the City as to Peet's claim for municipal liability, because Peet has not produced sufficient evidence tending to prove that Detroit tolerated a custom of federal rights violations that could have caused Peet to be arrested without probable cause. "To prevail in a § 1983 suit against a municipality, a plaintiff must show that the alleged federal right violation occurred because of a municipal policy or custom." Thomas v. City of Chattanooga, 398 F.3d 426, 429 (6th Cir.2005).

Peet argues in his brief that the evidence creates a genuine issue of material fact about whether Detroit has a "custom" of "intimidating witnesses, falsely accusing/arresting witnesses during police investigations, and retaliating against citizens who do not support the department in its coercive activities." Peet also argues in his brief that "the evidence presented in this case shows a failure to train and supervise" Detroit police officers. Thus, in this court Peet relies on two municipal-liability theories: first, custom; and second, failure to train. Ultimately, Peet has supplied too little Rule 56 evidence to create a genuine issue of material fact regarding the custom theory, and he raises the failure-to-train theory for the first time on appeal.

A.

[5] Peet has presented insufficient Rule 56 evidence to create a trial-worthy dispute over whether Detroit has a custom of tolerating federal rights violations. At most, Peet has presented admissible record testimony that he, Darryl Williams, and Julian Latham were incarcerated and coerced in violation of their constitutional rights. But no reasonable juror could find on the basis of three discrete incidents that a city-wide policy or custom of unconstitutional treatment of witnesses was in place.

Peet cites the following evidence to establish a policy or custom of arresting witnesses without probable cause. Darryl Williams testified that the police arrested and locked him up without charges so that they could question him about the shooting at Coney Island. Williams also stated that

the police directed him to provide the testimony they "wanted to hear" or he would be held longer.

Julian Latham similarly testified that he was arrested for questioning and that the police "coerce[d] me to say that" Peet and Spencer committed the crimes at the restaurant. Latham said that because the police disliked his testimony exonerating the plaintiffs the police locked him up and held him for three days, threatening to confine him until he told the "truth" that Peet and Spencer were guilty. Latham said that Investigator Pearson threatened to charge him with murder after he refused to change his story.

Bracey testified similarly, but solely as the result of admittedly leading questions by counsel for the plaintiffs to which opposing counsel objected repeatedly. Consequently, Bracey's testimony to this effect is inadmissible and will not be considered.FN3

FN3. Peet also points to other evidence that we may not consider. For instance, he alleges that in proceedings in a different case in federal district court in Michigan, a Detroit police sergeant admitted that a custom, policy, and practice of detaining all witnesses exists in Detroit. In particular, Peet cites Taylor v. City of Detroit, 368 F.Supp.2d 676, 692 (E.D.Mich.2005), to establish this fact. The district court opinion in Taylor does not demonstrate a policy. First, Taylor itself held only that a genuine issue of material fact exists regarding Detroit's alleged custom of arresting witnesses without probable cause. See id. Taylor did not hold that such a custom actually exists; that issue remains to be decided at a later trial. Second, the Taylor court's holding that a genuine issue of material fact existed in that case was record-specific and may not be automatically imposed on

other district courts or this court. Since the evidence on which Taylor's denial of summary judgment in favor of the defense is premised is not before this court, Taylor has no relevance to the "custom" issue in this appeal. Third, while Peet had the district court opinion admitted into evidence, he did not obtain admission of the evidence upon which the district court relied. Finally, the plaintiffs point to a consent judgment entered into by the City and the U.S. Department of Justice. The consent judgment is not part of the record in this case.

*568 All told, the plaintiffs have produced only the arrests of Peet, Williams, and Latham as admissible evidence of a city-wide custom of arresting witnesses without probable cause. But that is not enough to create a genuine issue of material fact. A custom or policy must be shown by "a clear and persistent pattern," and three discrete instances in one investigation is simply not enough to reasonably draw such a conclusion. See Thomas, 398 F.3d at 432. Just as this court held in Thomas that no reasonable juror could "infer a municipal-wide policy based solely on one instance of potential misconduct," id., no reasonable juror could infer such a custom or policy based on a mere three instances that are limited to one police investigation.

B.

[6] In his brief, Peet argues that the City is liable for officers' constitutional violations against him because the City failed to train its officers adequately. Peet, however, neglected to raise this argument in the district court. We decline to consider Peet's failure-to-train argument for the first time on appeal. See Saylor v. United States, 315 F.3d 664, 669 (6th Cir.2003).

The grant of summary judgment to the City as to Peet's claim for municipal liability was proper.

IV.

[7] Finally, Peet and Spencer argue that the City is liable for subornation of perjury under the Due Process Clause, based on the rule of Sperle v. Michigan Department of Corrections, 297 F.3d 483, 491 (6th Cir.2002). But Sperle does not permit a claim for subornation of perjury on this record. Sperle permitted recovery for government actions that increase the risk of injury to the plaintiffs from private parties. See id. Sperle has no application to this case. There is no risk of injury from private parties to speak of here that could have resulted from the defendants' alleged subornation of perjury-at least none pointed out by Peet and Spencer in their briefs. Consequently, the plaintiffs' argument based on Sperle has no merit.

No supportable basis has been presented for reversing the grant of summary judgment to the City with respect to Peet's and Spencer's subornation of perjury claim.

V.

For the foregoing reasons, the judgment of the district court is affirmed.

HOLSCHUH, District Judge, concurring in part and dissenting in part.

I concur in the majority opinion concerning plaintiffs' claims of subornation of perjury (Section IV).

*569 With great respect for my colleagues, I must dissent from the remainder of the majority opinion which holds that: (1) there was probable cause for Spencer's arrest, and that any deficiencies in the request for an arrest warrant, submitted after Spencer was taken into custody, are irrelevant to that probable cause determination; (2) even if Peet had been arrested without probable cause, Dwight Pearson cannot be held liable because he did not participate in Peet's arrest; (3) Peet submitted insufficient evidence that his illegal arrest was caused by a custom or policy of the City of Detroit; and (4) plaintiffs are estopped from asserting their claims of malicious prosecution.

I. Claims of Arrest Without Probable Cause

A. The Effect of Deficiencies in the Request for an Arrest Warrant After a Warrantless Arrest

On appeal, Jeemell Spencer and Dennis Peet argue that the district court erred in granting summary judgment in favor of Dwight Pearson on their § 1983 claims for arrest without probable cause. As the district court noted, Pearson was "the homicide officer in charge of the investigation." J.A. at 42.FN1 After Spencer and Peet were arrested, Pearson prepared an investigative report, which he submitted to the Wayne County Prosecutor's Office along with all then-existing witness statements, and a request for an arrest warrant. The Prosecutor's Office, in turn, submitted that information to a local state court judge who determined that

probable cause existed and issued an arrest warrant for Spencer and Peet.

FN1. All citations to the Joint Appendix refer to the Joint Appendix submitted in connection with Peet v. City of Detroit, 2007 WL 2768298.

The arrest warrant was issued even though Spencer and Peet were already in custody. This is because, under Michigan law, if an accused is in custody as a result of a warrantless arrest, a magistrate, upon a finding of "reasonable cause," i.e. probable cause, shall either issue an arrest warrant or make an endorsement upon the complaint of a finding of reasonable cause. M.C.L.A. 764.1c. Michigan's statute codifies the Supreme Court's holding in Gerstein v. Pugh, 420 U.S. 103, 124-125, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), that whenever a person is arrested without a warrant, an impartial judge must make a "fair and reliable determination of probable cause." This requirement implements the "Fourth Amendment's protection against unfounded invasions of liberty and privacy." Id. at 112, 95 S.Ct. 854. The probable cause determination must generally be made within 48 hours after the arrest. See County of Riverside v. McLaughlin, 500 U.S. 44, 56, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). Unless the judge finds that probable cause existed for the arrest, the suspect must be released. The relevant question is whether, at the moment of the arrest, probable cause existed to believe that the arrestee had committed a crime. See Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

Pearson's investigative report was presented to a judge in support of the request for the arrest warrant and, unquestionably, was relied upon by the judge in making the probable cause determination. One of the key issues in this

case is whether it matters that Pearson's report contained false and misleading statements and omitted material exculpatory information.

Citing Beck, the majority finds that any events occurring after the arrests of *570 Spencer and Peet are irrelevant. Maj. Op. Section II(B). I certainly agree that, pursuant to the holding in Beck, only the evidence known to the officer at the moment of the arrest is relevant to a determination of whether probable cause exists to believe that the arrestee has committed a crime. The majority, however, overlooks the important constitutional issue presented by the facts of this case. It is not a simple question of whether probable cause did, in fact, exist for the arrests of Spencer and Peet, as the majority believes. At issue in this case is whether a person acting under color of state law-in this case, Detective Pearson-can be held liable for a Fourth Amendment violation under 42 U.S.C. § 1983 for submitting false and misleading statements and making material omissions in his request for an arrest warrant. In this case, the plaintiffs already being in custody, the purpose was to obtain a finding that probable cause existed for the warrantless arrests, thereby justifying the continued incarceration of the arrestees. FN2

FN2. The majority contends that Spencer and Peet failed to raise this argument in their complaints. See Maj. Op. Section II(B) n. 2. Although stated in the context of any claim of qualified immunity by defendants, plaintiffs did allege the unlawful conduct of defendants by reasons of "their non-testimonial acts of misstating their Investigator's Report to influence the appearance of Plaintiff's guilt so that a warrant could issue and in providing false evidence to a

magistrate so that probable cause could be established." First Am. Compl. 50, J.A. at 26.

If the constitutional requirement that, within 48 hours following a warrantless arrest, an impartial judge must make a "fair and reliable determination of probable cause," is to have any meaning at all, the information submitted to the judge in support of the warrant request is most certainly relevant. Unless the judge is presented with accurate information about the specific evidence that existed at the moment of the arrest, it is impossible to make a "fair and reliable determination of probable cause."

In cases involving search warrants, and in cases involving arrest warrants sought prior to an arrest, the law is clear that an officer may be held liable under 42 U.S.C. § 1983 for an illegal search or seizure when the officer "knowingly and deliberately, or with a reckless disregard for the truth" makes "false statements or omissions that create a falsehood" and "such statements or omissions are material, or necessary, to the finding of probable cause." Wilson v. Russo, 212 F.3d 781, 786-87 (3d Cir.2000) (cited with approval by the Sixth Circuit in Vakilian v. Shaw, 335 F.3d 509, 517 (6th Cir.2003)). FN3 See also Hill v. McIntyre, 884 F.2d 271, 275 (6th Cir.1989). As this court said in Hinchman v. Moore, 312 F.3d 198, 205-06 (6th Cir.2002), "[f]alsifying facts to establish probable cause to arrest and prosecute an innocent person is of course patently unconstitutional." When an affidavit contains false statements or material omissions, the question becomes whether, once the false statements are omitted and the omitted facts are inserted, the "corrected affidavit" is still sufficient to establish probable cause. Wilson, 212 F.3d at 789. See also Hill, 884 F.2d at 275 (a Fourth *571 Amendment violation exists if, "with the affidavit's false material set to one side, the affidavit's remaining content is

insufficient to establish probable cause" (quoting Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978))).

FN3. "An assertion is made with reckless disregard when 'viewing all the evidence, the affiant ... entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.' " Wilson, 212 F.3d at 788 (quoting United States v. Clapp, 46 F.3d 795, 801 n. 6 (8th Cir.1995)). Omissions are made with reckless disregard if an officer withholds "a fact in his ken" that "any reasonable person would have known ... is the kind of thing the judge would wish to know." Wilson, 212 F.3d at 788 (quoting United States v. Jacobs, 986 F.2d 1231, 1235 (8th Cir.1993)).

I believe that this same analysis must be applied when an arrest warrant is sought following a warrantless arrest. The probable cause determination by an impartial judge is more than a "rubber stamp" after the fact of an arrest. The judge is required to make an independent determination of whether probable cause existed at the moment of the arrest. If it is a constitutional violation to submit false statements and omit material facts when seeking a warrant prior to an arrest, it is also, in my opinion, a constitutional violation to submit false statements and omit material facts when seeking a judicial determination of probable cause following a warrantless arrest. The constitutional requirement of a "fair and reliable determination of probable cause" applies with equal force in both cases. With this premise in mind, I turn then to an application of the law to the facts of this case.

B. The False and Misleading Statements and Material Omissions in the Request for an Arrest Warrant

Based on the information Pearson submitted with his request for an arrest warrant, the judge determined that probable cause existed for the warrantless arrests of Spencer and Peet, and therefore they continued to be held in jail. That probable cause determination, however, was based on a report that was constitutionally deficient in numerous respects. It contained false and misleading statements and omitted a great deal of exculpatory information.

The most glaring error was Pearson's patently false statement that eyewitnesses Bracey and Anderson would testify that Spencer and Peet (identified in the report as "Defendants # 1 and # 2"), had robbed them at the gas station next to the Coney Island restaurant. J.A. at 381. In fact, absolutely nothing in their statements implicates Spencer or Peet. That same report states that Feanda Wilson saw "Defendants # 1 and # 2," i.e., Spencer and Peet, attempt to rob Reed Byrd of his coat, and heard "Defendant # 1," i.e., Spencer, tell the unidentified gunman to shoot Byrd. J.A. at 380-81. The judge who made the probable cause determination obviously would have relied on the fact that, according to Pearson's report, three separate eyewitnesses-Wilson, Bracey and Anderson-all had identified Spencer and Peet as participants in the crime prior to their arrests, an extremely inculpatory fact that was, however, undeniably false.

Pearson's report also states that Wilson, the key witness, would testify that she positively identified Spencer and Peet in a show up/line up at the police station. J.A. at 381. While not technically a false statement, it is patently misleading. It would lead any judge to believe that Wilson's eyewitness identification of Spencer and Peet in the lineup at the police station occurred before the arrests. In fact, the identification

did not occur until after the arrests. Because the probable cause determination must be based on what evidence existed at the moment of the arrest, the evidence submitted to the judge should have been confined to the evidence Pearson had available when Spencer and Peet were taken into custody. Evidence of Wilson's later eyewitness identification should not have been submitted to the judge for consideration in determining whether probable cause existed at the time of the arrests.

*572 Not only did the report contain false and grossly misleading statements, it also omitted important exculpatory information. For example, it fails to note discrepancies between the physical descriptions of the robbers given by witness John Anderson and by Feanda Wilson. Wilson described the gunman as a black male, 20-23, 5'7", 165-170, light complexion, braided hair, light grey jogging suit, white shirt. She described the man who gave her his pager number, i.e., Spencer, as a black male, 20-25, 5'4"-5'5", 170, dark complexion, mustache, braids, wearing a black leather jacket and dark pants. The other accomplice, i.e., Peet, was described as a black male, 20-25, 5'8", 180, light complexion, low cut hair, gray hooded sweatshirt, light colored pants. J.A. at 236. Anderson's description of the gunman matched Wilson's statement.FN4 However, Anderson stated that one of the other accomplices was wearing a red pullover jacket and a red skull cap. J.A. at 451-52. This description is, of course, completely inconsistent with Wilson's descriptions of Spencer and Peet.

FN4. Notably, the physical descriptions of the perpetrators given by these witnesses would comfortably fit a large number of African-American men.

Pearson's report also fails to note that although the initial police report indicates that there were only two perpetrators, Wilson later stated that there were three. J.A. at 235-37, 394. In addition, the report fails to mention that although Wilson initially told the responding officer that the suspects were driving a light blue Ford F-150 pickup truck, J.A. at 394, and later said it was a dark blue Ford F-150, J.A. at 236, Peet's vehicle was actually a midnight blue Dodge Ram.

It is undisputed that, at some point during the investigation, Pearson came to doubt the veracity of Wilson's statement. On May 2nd, just four days after he submitted his report, he wrote in his Progress Notes that he planned to arrange for Wilson to take a polygraph test because her statement was out of line with the statements of all other witnesses. Pearson admitted at his deposition that he might have had doubts about the truthfulness of Feanda Wilson's statement even before the warrant was issued:

Q. Okay. But between the time you took Wilson's statement and the time you took Bracey's statement, you had a question about Feanda Wilson's truthfulness, correct?

A. I don't know when I had a disbelief at the time. It might have been after the warrant was signed.

Q. It might have been before the warrant was signed, correct?

A. Could have been.

Q. And if it had been before the warrant was signed-

A. Then a warrant probably wouldn't have been signed.

Q. Would you have been duty-bound to put that in your request for warrant?

A. You don't put that in your warrant request.

Q. You don't?

A. No.

Q. Why not?

A. It's information about the circumstances. It don't say if you have witnesses in doubt.

Q. You don't put in there that I don't think she's being truthful?

A. No, you don't.

*573 Q. You don't put in there the parts that you think she's being untruthful about?

A. The reason why I don't put it in there is because all I do is gather information and give it to the prosecutor. Even though the statement is saying one thing, she the one made the statement. If any of us have any doubtfulness, then we'll

let the prosecutor know maybe on a piece of paper that witness may be questionable, but it never goes into the investigative report.

J.A. at 364-365. So even if Pearson had doubts about the truthfulness of his key witness, he would have concealed those doubts from his investigative report and his request for a warrant made to the judge who was to make the probable cause determination. In my view, Pearson's failure to disclose his doubts about the veracity of Wilson's statement in his report and request must be considered a material omission.

I believe that Pearson had good reason to doubt the veracity of Wilson's statement even before he submitted the request for an arrest warrant. Wilson's written statement was inconsistent with the statement she gave to the police who responded to her call at the scene of the crime, and it was not corroborated by the statement of any other witness. Common sense also calls her statements into serious doubt. As this court pointed out in Gardenhire v. Schubert, 205 F.3d 303 (6th Cir.2000), the unlikely conduct of a defendant is a factor to consider in the determination of whether a police officer had probable cause for a warrantless arrest. Id. at 315 ("It is unlikely that one store owner would steal goods from another and then leave those goods in the window of her own store-front."). In this case, it is extremely unlikely that Spencer would give Wilson his pager number so that she could locate him, and then proceed to commit a violent crime in her presence. As Gardenhire also points out, officers must consider the "totality of the circumstances, recognizing both the inculpatory and exculpatory evidence" in determining whether they have

probable cause to make an arrest. Id. at 318 (emphasis in original).

The question then becomes whether, once the false and misleading inculpatory statements are omitted from Pearson's report, and the material exculpatory evidence is included, probable cause nevertheless exists to believe that Spencer or Peet had committed a crime.FN5

FN5. In footnote 2 of the majority opinion, the majority contends that there are two "temporal" problems with the dissent's position. First, the majority claims that there is no evidence that Pearson had any doubt about the culpability of the plaintiffs prior to his submission of the warrant request. To the contrary, as noted above, Pearson admitted at his deposition that he might have had doubts about Wilson's truthfulness even before the warrant was signed. J.A. at 364-65. Second, the majority contends that "the dissent faults the investigators for mentioning Wilson's eyewitness identification in their warrant request." This is not correct. The dissent faults Pearson for including this information without disclosing to the judge that Wilson's identification took place after Spencer and Peet had already been arrested. Absent this disclosure, the judge was misled to believe that Wilson's eyewitness identification took place before Spencer and Peet were taken into custody and thus considered identification evidence that did not exist at the moment of plaintiffs' arrests.

The dissent does not fault Pearson for failing "to include post- warrant exculpatory evidence." Indeed, if evidence becomes known for the first time after the warrant request has been submitted, it obviously could not have been included in that request. The dissent admits that it does fault Pearson "for including post- arrest incriminatory evidence,"

because such evidence is also irrelevant to a determination of whether probable cause existed at the moment of the arrests. The majority further argues that this post-arrest evidence "did not clearly exonerate Spencer and Peet." Apart from the fact that it is not our responsibility to judge the guilt or the innocence of Spencer and Peet-whether certain evidence does or does not exonerate them-the point is that inculpatory events post-arrest and prior to warrant, such as Wilson's line-up identification, should not be used for the purpose of obtaining a finding of probable cause for their arrests.

Finally, I do not feel that it is true, as the majority contends, that "the dissent demands a level of perfection that would be difficult for most police departments to meet." I do not believe that it is unreasonable to expect law enforcement officers seeking a probable cause determination from a judge following a warrantless arrest to refrain from submitting false and misleading statements and omitting exculpatory evidence known to the officer. I am confident that improper conduct of this nature rarely happens. However, when it does, as in this case, there should be a remedy for an arrestee whose Fourth Amendment right to a fair and reliable determination of probable cause has been violated.

*574 C. Pearson's Liability for Unlawful Arrests

1. Probable Cause for Spencer's Arrest is a Jury Issue

With respect to Spencer, the majority concludes, as did the district court, that probable cause existed to believe that Spencer had robbed Reed Byrd outside the Coney Island restaurant. That conclusion is based primarily on Wilson's

written witness statement, taken approximately six hours after the shootings. According to Wilson, the gunman's two accomplices came into the Coney Island restaurant to order food. One of them gave her his pager number, either "232-0235 or 6235 and the name 'Mail.' " J.A. at 236. The two then went to the parking lot and ate in their truck, a "dark blue Ford F-150 pickup, late 80's, early 90's." J.A. at 236. Wilson said that she later observed these two men trying to rob Reed Byrd of his coat and heard the one who had given her his pager number tell the gunman to shoot Byrd. J.A. at 235-36.

Pearson traced that pager number to Spencer and arrested him without a warrant shortly thereafter. If Wilson's statement, standing alone, were reliable enough to support probable cause for Spencer's arrest, then Pearson should have immediately sought an arrest warrant. Pearson, however, obviously felt the need to obtain additional evidence to justify the warrantless arrest. In County of Riverside, the Supreme Court held that "delays for the purpose of gathering additional evidence to justify the arrest" were just one example of unreasonable delays in seeking an arrest warrant. 500 U.S. at 56, 111 S.Ct. 1661. Pearson's Progress Notes indicate that three hours after Spencer's arrest, and prior to writing his request for an arrest warrant, Pearson arranged to have Wilson identify Spencer in a lineup. Before writing the request for an arrest warrant, Pearson also went to the scene of the crime to see if any video cameras were running when the crime occurred and took the gas station cashier, Salah Alhalmi, to the police station for questioning.FN6

FN6. Alhalmi's statement is not part of the record.

I believe that genuine issues of material fact preclude summary judgment on the question of whether, at the time of Spencer's arrest, probable cause existed to believe that he had committed a crime. There is no question that after Spencer returned a call placed to one of the pager numbers given by Wilson, Spencer was arrested based only on this evidence. However, even though Wilson said that the man who gave her the pager number said his name was "Mail," J.A. at 236, there is no evidence that Spencer ever used that name. Pearson obviously believed that the *575 evidence against Spencer was not enough to justify probable cause for the arrest, because he did not prepare his report and request for a warrant until after Wilson had identified Spencer in a police lineup. As noted earlier, however, Wilson's eyewitness identification of Spencer at the lineup must be excluded from consideration because it occurred after his arrest.

Construing the evidence in the light most favorable to the plaintiff, I believe that a reasonable jury could find that Spencer was arrested without probable cause. This is particularly true once Pearson's admittedly false but extremely inculpating statements concerning eyewitnesses Bracey and Anderson are excluded from consideration, and all material exculpatory evidence, including Wilson's contradictory statements and Pearson's doubts about her credibility, are taken into consideration. As this court has said on more than one occasion, "the existence of probable cause in a § 1983 action presents a jury question, unless there is only one reasonable determination possible." Wilson v. Morgan, 477 F.3d 326, 334 (6th Cir.2007) (quoting Gardenhire, 205 F.3d at 315). See also Gregory v. City of Louisville, 444 F.3d 725, 743 (6th Cir.2006) ("In a § 1983 action, the existence of probable cause is a question of fact. See United States v. Gaudin, 515 U.S. 506, 521, 115 S.Ct.

2310, 132 L.Ed.2d 444 (1995)."). I would therefore reverse the summary judgment rendered in favor of Pearson and have the issue of probable cause for Spencer's arrest submitted to a jury. I turn next to Peet's claim of arrest without probable cause.

2. Peet is Entitled to Summary Judgment on His Claim of Arrest Without Probable Cause

a. Lack of Probable Cause

The district court held that Peet's admission that he was present at the Coney Island restaurant on the night in question was sufficient, when coupled with Wilson's statements, to establish probable cause for Peet's arrest. As discussed in the next section, the majority affirms the district court's order granting summary judgment in favor of Pearson, albeit for a different reason.

The majority opinion states that, "Investigator Pearson identified the plaintiffs, Dennis Peet and Jeemell Spencer, as suspected accomplices by relying, primarily, on Spencer's pager number, which an eye witness, Feanda Wilson, provided." Maj. Op. Section I. This is not entirely correct. Pearson identified Spencer as a suspect based on Spencer's pager number, but Pearson had no evidence that would have justified Peet's arrest. In fact, at his deposition, Pearson testified that he did not know what probable cause existed for Peet's arrest, other than, "[h]e could have been put in the system as wanted in regards to questioning to a homicide if that goes into the system." J.A. at 363. Peet testified that he was arrested as soon as he acknowledged that he had witnessed the robbery at the Coney Island restaurant. J.A. at

314. Peet's admission that he was present at the Coney Island restaurant on the night in question is, of course, insufficient to establish probable cause for his arrest. United States v. Castro-Gaxiola, 479 F.3d 579, 583 (8th Cir.2007).

In my opinion, no reasonable jury could find that probable cause existed for Peet's arrest. None of the witness statements, including Wilson's, incriminates Peet. Wilson did not identify Peet by name and, as noted earlier, her identification of Peet during the lineup occurred after his arrest and is therefore irrelevant to the probable cause determination. While the record shows that Peet was arrested within a few *576 hours of Spencer's arrest, absolutely nothing in the record indicates how the police came to suspect that it was Peet who was with Spencer on the night in question. Moreover, as noted earlier, although Wilson stated that the perpetrators left the scene in a Ford F150 pick-up truck, Peet was arrested while possessing a Dodge Ram pick-up truck. For these reasons, as well as those discussed earlier, I believe that, at the time of Peet's arrest, the police clearly lacked probable cause to believe that he had committed a crime, and that no reasonable jury could find otherwise. I would therefore reverse the district court's order granting Pearson's motion for summary judgment and remand with instructions to enter summary judgment in favor of Peet on Peet's cross-motion for summary judgment.

b. Pearson's Liability for Peet's Wrongful Arrest

The district court acknowledged that there was a genuine issue of material fact concerning "Pearson's alleged omissions and mischaracterizations regarding Bracey's and Anderson's statements," but found that Peet's admission that

he was present during the robbery, coupled with Wilson's statements, established probable cause for his arrest. J.A. at 46-49. On appeal, Peet challenges this holding. The majority, however, avoids the probable cause issue, affirming the district court for an entirely different reason.

The majority opinion affirms the summary judgment against Peet for the reason that, "the record does not reflect that Pearson participated in the arrest of Peet. His deposition says that he did not, his progress notes do not mention it, and we are directed to no contrary testimony." Maj. Op. Section III. The majority raises this issue for the first time in this case.FN7 The record, in my opinion, does not support the majority's argument that Pearson did not participate in Peet's arrest.

FN7. In their Motion for Summary Judgment, the Appellees themselves agreed that a claim was stated against Pearson. "With the exception of Defendant Pearson, Plaintiff fails to state a claim against the other defendant police officers." J.A. at 108.

First, it is undisputed that Pearson, an investigator with the Homicide Squad, received this case at 8:00 A.M. following the murder of Byrd, and that he was the sole person in charge of the investigation that culminated in his investigation report and request for an arrest warrant. He prepared detailed notes of the progress of his investigation, J.A. at 372-377, and according to the Appellees' own brief, Pearson prepared the warrant request and submitted it to the Wayne County Prosecutor's Office which, in turn, submitted it to a judge for the issuance of the arrest warrant. Appellee's Brief at 9-10.

Second, while there is no evidence that Pearson himself was physically present when Officer Amos arrested Peet, it is inconceivable that Amos would take it upon himself to arrest Peet without being instructed to do so by Pearson, who was in charge of the investigation, or without Pearson's knowledge and approval. Moreover, Peet was promptly taken by Officer Amos to the police station where Pearson himself was waiting to conduct a lineup that included Peet. J.A. at 156-158.

Third, Pearson never testified that he did not participate in Peet's arrest. Pearson simply testified that he "wasn't with him when he was arrested" and "I didn't lock him up." J.A. at 363. The person in charge of a murder investigation is not expected to be physically present at every arrest made during the course of the investigation, but Pearson's absence does not necessarily relieve him from liability for a *577 wrongful arrest that, even if not directed by him, was obviously approved by him.

Fourth, the fact that Pearson's Progress Notes do not mention that Pearson directed Peet's arrest and failed to show Pearson being present at Peet's arrest does not, of course, mean that Pearson had nothing to do with Peet's arrest. The overwhelming and uncontradicted evidence shows that it was Pearson who was in the commander's seat, the man in charge of the investigation, the person who was waiting for Amos to bring Peet to the police station so that Feanda Wilson could identify Peet in a lineup.

Fifth, there is no "contrary testimony" to Pearson's testimony that he was not present when Amos arrested Peet, because that fact is not disputed. It is also not disputed that Pearson supervised the investigation, noted Peet's arrest in

his Progress Notes, and arranged for the lineup promptly after Peet's arrest.

Pearson concededly cannot be held liable for Peet's arrest by Amos on a respondeat superior basis, but he can be held liable, as the person in charge of the investigation that included Peet's arrest, if he "at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." Hays v. Jefferson County, 668 F.2d 869, 874 (6th Cir.1982).

There was absolutely no evidence of probable cause for the arrest of Peet. He was arrested solely on his statement that he had been at the scene of the crime; yet, he was immediately handcuffed and taken to the jail where Pearson was waiting for him so he could be placed in a lineup with the hope that Feanda Wilson would identify him. Pearson had no knowledge of any facts that would justify Peet's arrest, but he nevertheless, at the very least, "implicitly authorized, approved, or knowingly acquiesced" in the warrantless arrest.

D. Qualified Immunity

Neither the district court nor the majority reaches the issue of qualified immunity because they find that Pearson is entitled to summary judgment on the merits of plaintiffs' claims of unlawful arrest. Since I reach the contrary conclusion, a brief discussion of qualified immunity is warranted. "Qualified immunity is an affirmative defense that shields government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known.' " Estate of Carter v. Detroit, 408 F.3d 305, 310 (6th Cir.2005) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). As the Supreme Court explained in Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), qualified immunity involves a two-step inquiry. First, the court must determine whether the facts, viewed in the light most favorable to the plaintiff, show that a constitutional violation has occurred. Second, the court must determine whether the constitutional right was clearly established. Id. at 201, 121 S.Ct. 2151.

I would find that Pearson is not entitled to qualified immunity on plaintiffs' claims of arrest without probable cause. For all of the reasons previously discussed, I would find that, viewed in the light most favorable to the plaintiffs, there is abundant evidence that a Fourth Amendment violation occurred. Pearson, in his report submitted in connection with the warrant request, knowingly and deliberately, or with a reckless disregard for the truth, made false statements and omissions that were material to a determination of probable cause. As this court held in Hinchman, this is "of course patently unconstitutional." 312 F.3d at 205-06. Once those *578 false and misleading statements are omitted and the omitted exculpatory evidence is included, it is my opinion that no reasonably competent police officer would have believed that probable cause existed to believe that Spencer and Peet had committed a crime. Moreover, as this court recently noted in Leonard v. Robinson, 477 F.3d 347 (6th Cir.2007), "[i]t is clearly established that arrest without probable cause violates the Fourth Amendment." Id. at 355 (quoting Donovan v. Thames, 105 F.3d 291, 297-98 (6th Cir.1997)). Therefore, in my view, Pearson is not entitled to qualified immunity on plaintiffs' § 1983 claims for unlawful arrest.

E. Municipal Liability for Peet's Arrest

Peet's First Amended Complaint alleged that the City of Detroit should be held liable for his unlawful arrest because, in part, the City had "a custom or policy of arresting witnesses to get them to cooperate." J.A. at 29. Peet claims that he was arrested solely because he was a witness to a crime. According to Peet's testimony, after he was approached by the police and identified himself as Dennis Peet, they asked him if he had witnessed a crime that was committed at the Coney Island restaurant. When Peet replied, "Yes, I seen some guy get robbed up there," he was immediately handcuffed and taken to jail. J.A. at 314.

The district court granted summary judgment in favor of the City of Detroit, holding that plaintiffs could not complain about the alleged unconstitutional arrests and treatment of other persons who were also questioned in connection with Byrd's murder. With respect to plaintiff Peet, the court found that "the Detroit Police Department had a probable cause to arrest Peet as a suspect following Miss Wilson's statement ... and as such the claims about the Detroit Police Department's policies and practices regarding the arrests of witnesses in murder cases are not implicated here." J.A. at 461-462.

The majority affirms the district court's decision granting summary judgment in favor of the City, "because Peet has not produced sufficient evidence tending to prove that Detroit tolerated a custom of federal rights violations that could have caused Peet to be arrested without probable cause." Maj. Op. Section III. The majority notes that there is evidence that, like Peet, two other persons were arrested as

witnesses to the crime and threatened with continued detention or criminal charges if they did not implicate Spencer and Peet in the murder. The majority finds that these three incidents, all related to this case, are insufficient to establish a policy or custom on the part of the City.

The majority does not consider other evidence that, at the time of Peet's arrest, the City of Detroit had an established practice of arresting witnesses to major crimes. Plaintiffs submitted the deposition testimony of Sergeant Felix Kirk of the Detroit Police Department, who testified in the case of Taylor v. City of Detroit, 368 F.Supp.2d 676, filed in the Eastern District of Michigan. Kirk testified that the Department was recently forced to change its policy involving "illegal detention of witnesses and the arrest of witnesses." J.A. at 440. In that case, the court denied the City's motion for summary judgment, finding sufficient evidence that the police department had a "custom or policy of unconstitutional conduct." See Taylor v. City of Detroit, 368 F.Supp.2d 676, 692 (E.D.Mich.2005).

Construing all of this evidence in the light most favorable to the plaintiff, a reasonable jury could find that the City's policy or practice of arresting witnesses to crimes was the moving force behind Peet's *579 unlawful arrest. I would therefore reverse the district court's order granting summary judgment in favor of the City on Peet's claim of unlawful arrest.

II. Malicious Prosecution Claims

A. The Elements of a Tort Claim of Malicious Prosecution

1. Common Law Tort

The elements of the common law claims of false arrest and malicious prosecution are clearly different. A state law claim of false arrest is based simply on an absence of probable cause for the arrest. A state law claim of malicious prosecution, in this case under Michigan law, requires proof:

(1) that the defendant has initiated a criminal prosecution against him, (2) that the criminal proceedings terminated in his favor, (3) that the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice.

Peterson Novelties, Inc. v. City of Berkley, 259 Mich.App. 1, 672 N.W.2d 351 (2003) (quoting Matthews v. Blue Cross & Blue Shield of Mich., 456 Mich. 365, 572 N.W.2d 603 (1998)).

2. Constitutional Tort

In Spurlock v. Satterfield, 167 F.3d 995, 1005 (6th Cir.1999), this court held that fabricating evidence and manufacturing probable cause to unlawfully detain a suspect constituted a Fourth Amendment violation. With the exception of one panel's decision in Frantz v. Village of Bradford, 245 F.3d 869 (6th Cir.2001), the law in this circuit is uniform and well established that a malicious prosecution claim can be based on the Fourth Amendment, and that prosecution without probable cause constitutes a violation of

that Amendment. In Barnes v. Wright, 449 F.3d 709 (6th Cir.2006), the court stated:

We "recognize a separate constitutionally cognizable claim of malicious prosecution under the Fourth Amendment." Thacker v. City of Columbus, 328 F.3d 244, 259 (6th Cir.2003). Such a claim encompasses wrongful investigation, prosecution, conviction, and incarceration. Id. at 258 (citing Spurlock, 167 F.3d at 1005-07).

Id. at 715-16. See also Gregory v. City of Louisville, 444 F.3d 725, 749 (6th Cir.2006) ("continued detention without probable cause is an actionable Fourth Amendment injury under § 1983"); FN8 Bielefeld v. Haines, 192 Fed.Appx. 516, 520 (6th Cir.2006) ("this circuit has recognized a Section 1983 claim for malicious prosecution based on the Fourth Amendment"); Doyle v. McFadden, 182 Fed.Appx. 506, 509 (6th Cir.2006).

FN8. To emphasize that this constitutional tort is based on the Fourth Amendment and not on any due process grounds, the court said, "[s]eeking clarity in language, we decline to style Plaintiff's cause of action as an action for 'malicious prosecution' under § 1983. Rather, we characterize the cause of action simply as the right under the Fourth Amendment to be free from continued detention without probable cause." Gregory, 444 F.3d at 750.

While it is clear that a malicious prosecution claim is cognizable under § 1983 as a Fourth Amendment violation, our circuit has not yet defined all of the elements of this constitutional tort. In Fox v. DeSoto, 489 F.3d 227, 237 (6th Cir.2007), the court stated:

This court has recognized a § 1983 claim for malicious prosecution arising under the Fourth Amendment, but the contours of such a claim remain uncertain. Wallace, 127 S.Ct. at 1096, n. 2; *580 McKinley v. City of Mansfield, 404 F.3d 418, 444-45 (6th Cir.2005), cert. denied, 546 U.S. 1090, 126 S.Ct. 1026, 163 L.Ed.2d 854 (2006); Darrah v. City of Oak Park, 255 F.3d 301, 308-12 (6th Cir.2001). What is certain, however, is that such a claim fails when there was probable cause to prosecute, or when the defendant did not make, influence, or participate in the decision to prosecute. McKinley, 404 F.3d at 444-45; Darrah, 255 F.3d at 312; Skousen v. Brighton High Sch., 305 F.3d 520, 529 (6th Cir.2002).

See also Thacker, 328 F.3d at 259 ("[a]lthough this Court has yet to resolve the elements of a federal malicious prosecution claim, it is clear that a plaintiff must show, at a minimum, 'that there was no probable cause to justify [his] arrest and prosecution.' ").

In previous decisions of this court, it usually was not necessary to formulate the elements of a federal malicious prosecution claim, because either the plaintiff had failed to show that the prosecution was without probable cause or the plaintiff was estopped from asserting such a claim by reason of a judicial finding of probable cause following a fair evidentiary hearing. In view of the fact that, for the reasons hereafter stated, I believe that a jury question is presented on the issue of probable cause for the plaintiffs' prosecution and that plaintiffs are not collaterally estopped from asserting their claims, it appears that this is a case in which the elements of plaintiffs' wrongful prosecution claims necessarily need to be considered.

3. Suggested Elements

The dissenting opinion in Frantz proposed the following elements for a constitutional tort claim of malicious prosecution: (1) a seizure within the meaning of the Fourth Amendment by someone not entitled to absolute prosecutorial immunity; (2) objectively unreasonable prosecutorial action taken to bring the plaintiff before the court, independent of any initial physical seizure; and (3) termination of the criminal proceeding in favor of the plaintiff. Frantz, 245 F.3d at 879-80 (Gilman, J., dissenting).

In light of the more recent Sixth Circuit jurisprudence concerning this issue, I would suggest the following elements:

1. The defendant is a person who does not have absolute prosecutorial immunity for his or her conduct in the criminal prosecution of the plaintiff;

2. There was no probable cause for the initiation and maintenance of the criminal prosecution of the plaintiff;

3. The defendant intentionally influenced or participated in the initiation or the maintenance of the criminal prosecution of the plaintiff;

4. A person in defendant's position would have known that the facts and circumstances were not sufficient to justify a reasonable belief that the plaintiff had committed the offense with which the plaintiff was charged; and

5. The criminal prosecution of the plaintiff was subsequently terminated in favor of the plaintiff.

B. Application of the Suggested Elements to the Facts of this Case

There is no question that Pearson has no absolute prosecutorial immunity for his conduct in the criminal prosecution of the plaintiffs, that he intentionally influenced and participated in the initiation and maintenance of the criminal prosecution of the plaintiffs, and that the criminal prosecution *581 was subsequently terminated in favor of the plaintiffs. The only questions are whether there was probable cause for the initiation and maintenance of the criminal prosecution of the plaintiffs, and whether a person in Pearson's position would have known that the facts and circumstances were not sufficient to justify a reasonable belief that the plaintiffs had committed the offenses with which they were charged. In my opinion, these questions in this particular case must be determined by a jury.

The district court found, and I totally agree, that "[t]here may be enough evidence to create a genuine issue of material fact regarding Pearson's alleged omissions and mischaracterizations regarding Bracey's and Anderson's statements." J.A. at 46. The court nevertheless found, with reference to both questions of probable cause for plaintiffs' arrests and probable cause to bind plaintiffs over for trial, that "Wilson's eyewitness report" alone established probable cause. J.A. at 49. For the reasons discussed earlier, I believe that Wilson's statements made prior to plaintiffs' arrests, when considered with all of the facts and circumstances known to Pearson at the time of the arrests, were not

sufficient, on Pearson's motion for summary judgment, to establish probable cause for the arrests.

In determining whether probable cause existed for the initiation of criminal proceedings against plaintiffs, however, the court may consider not only the evidence that existed at the time of the arrests but also other evidence gathered before criminal charges were actually filed. Therefore, although Wilson's eyewitness identification of plaintiffs at the police lineups could not be considered in determining whether probable cause existed at the time plaintiffs were arrested, it may be considered in determining whether probable cause existed to file criminal charges against them, because the lineups took place before Pearson prepared his report and charges were filed. Indeed, the issue of probable cause for the prosecution of plaintiffs essentially hinges on Wilson's personal identification of them because, as Pearson himself noted in his Progress Notes, her statement was out of line with the statements of all other witnesses.

Wilson's eyewitness identification at the police lineups, however, does not conclusively establish probable cause. This court has held:

An eyewitness identification will constitute sufficient probable cause "unless ... there is an apparent reason for the officer to believe that the eyewitness 'was lying, did not accurately describe what he had seen, or was in some fashion mistaken regarding his recollection of the confrontation.' " This comports with the general notion that, since eyewitnesses' statements are based on firsthand observations, they are generally entitled to a presumption of reliability and veracity.

Ahlers v. Schebil, 188 F.3d 365 (6th Cir.1999) (internal citations omitted).

Similarly, in Wilson v. Russo, the court said:

The defendants maintain that a positive identification by a victim is sufficient by itself to establish probable cause that the identified party was the offender. While we agree that a positive identification by a victim witness, without more, would usually be sufficient to establish probable cause, this qualified precept cannot be rendered absolute. Independent exculpatory evidence or substantial evidence of the witness's own unreliability that is known by the arresting officers could outweigh the identification such that probable cause would not exist.*582 Each case must therefore be examined on its facts.

212 F.3d at 790 (emphasis added).

For all of the reasons discussed earlier, I believe that Pearson had good reason to believe that Wilson, his key witness, was not a credible witness. It is undisputed that, no later than May 2, 2000, long before the preliminary hearing on May 24, 2000, he came to question her credibility. His Progress Notes on May 2, 2000 indicate that her statement was out of line with those of the other witnesses and he planned for Wilson to take a polygraph test. It is not clear from the record, however, whether he ever communicated this doubt to the prosecutor or to the preliminary hearing judge who bound plaintiffs over for trial or, if he did, when this was done. Pearson himself testified that he did not put that extremely exculpatory fact in his investigative report:

"If any of us have any doubtfulness, then we'll let the prosecutor know maybe on a piece of paper that witness may be questionable, but it never goes into the investigative report." J.A. at 365. There is absolutely no evidence that Pearson ever noted his doubtfulness "on a piece of paper" given to the prosecutor.FN9

FN9. At some point, Pearson apparently turned his Progress Notes over to the prosecutor, but it is not clear when he did so. J.A. at 44, J.A. at 472.

In my view, if Pearson concealed from the prosecutor his doubts about the credibility of his key witness, or did not make such a disclosure at a time and in a manner for this exculpatory information to be properly given to defense counsel and considered by the magistrate judge at the preliminary hearing, Wilson's eyewitness identification of the plaintiffs at the police lineups should be given little or no consideration in determining whether there was, in fact, probable cause for the initiation and maintenance of the criminal prosecution against plaintiffs.

Moreover, as noted in Wilson v. Russo, the substantial evidence of Wilson's unreliability and the other independent exculpatory evidence known to Pearson could well outweigh the value of Wilson's eyewitness identification such that probable cause would not exist. 212 F.3d at 790. At the very least, this is a question for a jury and not for the judge on defendants' motion for summary judgment.

With regard to the remaining suggested element, it is clearly, in my view, also a jury question as to whether a police officer in Pearson's position would have known that the facts and circumstances were not sufficient to justify a

reasonable belief that the plaintiffs had committed the offenses with which they were charged.

While, in my opinion, construing the evidence in the light most favorable to the plaintiffs, it was error for the district court to find that Wilson's "eyewitness report" alone was sufficient to establish probable cause for the arrest and prosecution of plaintiffs, there remains the issue of whether plaintiffs are estopped from asserting their claims for malicious prosecution because of the preliminary hearing finding of probable cause.

C. Preliminary Hearing Finding of Probable Cause to Hold Defendants for Trial as Collateral Estoppel on the Issue of Probable Cause for the Prosecution

The majority finds that the district court "properly granted summary judgment to the officers as to Spencer's claim for malicious prosecution," because "Spencer has the problem of the judicial determination of probable cause following the evidentiary preliminary hearing." Maj. Op. Section *583 II(C).FN10 The majority finds that because there is no evidence that Pearson or the county prosecutor supplied the magistrate judge at that hearing with any false information to establish probable cause, plaintiffs are collaterally estopped from relitigating the issue.

FN10. It is a problem shared by Peet and Spencer; both made claims of malicious prosecution and both were bound over for trial following the preliminary hearing.

For the following reasons, I do not believe that the preliminary hearing in this case judicially precludes plaintiffs from pursuing their claims that the initiation and

maintenance of the criminal proceedings following their arrests were without probable cause.

First, under Michigan law of collateral estoppel, one of the four critical requirements is that "the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding." Darrah, 255 F.3d at 311. Based on the limited evidence in the record, I believe that it has not been shown that plaintiffs had a full and fair opportunity to litigate the issue of probable cause at the evidentiary preliminary hearing held on May 24, 2000.

As noted earlier, it is not clear whether Pearson ever conveyed his doubts concerning the credibility of his key witness, Feanda Wilson, to the prosecutor or to anyone else prior to that hearing. According to plaintiffs, after Pearson came to question Wilson's credibility, he did not go to the prosecutor. "He does nothing about that he doesn't come forth, he doesn't go to the prosecutor, he doesn't tell anybody about it." J.A. at 467. It is also alleged, and not denied, that this exculpatory information was not presented at the preliminary hearing. Appellants' Brief p. 29.

It is also difficult to tell, based on the limited record before us, what exculpatory evidence, if any, was made available and was presented at the preliminary hearing.FN11 Along with the request for an arrest warrant, Pearson allegedly "turned over all inculpatory and exculpatory statements to the prosecutor and to the defense attorney." J.A. at 462. However, many witness statements were not taken until after the date the warrant request was prepared. J.A. at 471. The record on appeal does not indicate when these additional statements, some of which were clearly exculpatory, were turned over. At the hearing on the

motions for summary judgment, counsel for plaintiffs indicated that some of this evidence, which was within Pearson's exclusive control, was not made available until the criminal trial. J.A. at 468. Plaintiffs apparently subpoenaed McGlory and Bracey to testify at the preliminary hearing, but these witnesses failed to appear. J.A. at 276. According to plaintiffs-and it does not appear to be denied by Pearson:

FN11. The record on appeal includes only 11 pages of a 78-page transcript. J.A. at 276-286.

We didn't even have the opportunity to put on McGlory or Bracey at the preliminary exam. The judge didn't allow us. They weren't subpoenaed by the prosecutor. There wasn't a continuance granted. We didn't have the opportunity to present Latham at the preliminary exam. We didn't have an opportunity to present Marion Benton or John Anderson at the preliminary exam. We didn't have the opportunity to present Ken Smith at the preliminary exam.

J.A. at 469. Under these circumstances, I believe that there are genuine issues of material fact as to whether plaintiffs had a "full and fair" preliminary hearing.

Second, we review the district court's grant of summary judgment de novo. Sperle v. Michigan Dep't of Corr., 297 F.3d 483, 490 (6th Cir.2002). In accordance with the established precedents of this court, in a § 1983 action the existence of probable cause is a question of fact to be determined by a jury, unless there is only one reasonable determination possible. Gregory, 444 F.3d at 743; Gardenhire, 205 F.3d at 315. Moreover, we must review the evidence in a light most favorable to the plaintiffs and draw all reasonable inferences in their favor. Voyticky v. Village

of Timberlake, 412 F.3d 669, 675 (6th Cir.2005). Under the circumstances of this particular case, in my opinion, there is, at the very least, a jury question presented as to both the probable cause for plaintiffs' arrests and probable cause for plaintiffs' prosecutions, both in alleged violation of the Fourth Amendment to the United States Constitution.

D. Qualified Immunity

Finally, it is necessary to apply the two-step inquiry discussed above to determine whether Pearson is entitled to qualified immunity on plaintiffs' claims of wrongful prosecution. Viewing the evidence in a light most favorable to plaintiffs, Pearson violated their Fourth Amendment rights by his conduct in influencing and participating in the decision to prosecute them. See Spurlock, 167 F.3d at 1005 (fabricating evidence and manufacturing probable cause, and wrongfully investigating and prosecuting the plaintiffs constituted a violation of the Fourth Amendment). Moreover, as the court noted in Spurlock, the right to be free from malicious prosecution is clearly established under the Fourth Amendment. Id. at 1006 (citing Smith v. Williams, 78 F.3d 585, 1996 WL 99329, at *5 (6th Cir.1996)). Because Pearson's conduct was not objectively reasonable in light of clearly established law, he is not entitled to qualified immunity on plaintiffs' claims of wrongful prosecution.

III. Conclusions

My conclusions are that:

1. The summary judgment in favor of Pearson and the City of Detroit on plaintiffs' claims of being arrested without

probable cause should be reversed as to both Spencer and Peet.

2. The case should be remanded to the district court for further proceedings on plaintiffs' claims of being arrested without probable cause because:

a. No jury issue is presented as to the arrest of Peet without probable cause. The undisputed facts show that Peet was illegally arrested without a warrant and that he is entitled to summary judgment against Pearson on this claim.

b. There is a genuine issue of material fact as to whether Peet's illegal arrest was caused by the City of Detroit's policy of arresting witnesses to crimes.

c. A jury issue of whether there was probable cause for Spencer's warrantless arrest is presented by the facts and circumstances of the case in view of the false inculpatory statements and the omitted exculpatory statements made by Pearson in his investigative report submitted to the prosecuting attorney and, in turn, to the judge.

d. Pearson is not entitled to qualified immunity on plaintiffs' claims of arrest without probable cause.

3. The case should be remanded to the district court for further proceedings on plaintiffs' claims of being wrongfully prosecuted because:

*585 a. There is a genuine issue of material fact as to whether there was probable cause for the prosecution of plaintiffs; and

b. There is a genuine issue of material fact as to whether plaintiffs are estopped from asserting their claims of wrongful prosecution.

c. Pearson is not entitled to qualified immunity on plaintiffs' claims of wrongful prosecution.

For the above reasons, I respectfully dissent.

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No. 07-1119

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In the Supreme Court of the United States

DENNIS PEET and JEEMELL SPENCER,
Petitioners,

v.

CITY OF DETROIT; DWIGHT PEARSON; LOVIER, SERGEANT; SULLIVAN, SERGEANT; HOWARD PHILIPS; PETERSEN, SERGEANT; DEBORAH NIX; JACKSON, LIEUTENANT; J. FISHER; BARBARA SIMON; WILLIAM RICE; CHARLES HOWARD; MARK AMOS, ED RUDONI; VISBARA, SERGEANT; CATHERINE ADAMS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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COUNTER- STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONERS FAILED TO SHOW A "TRUE CONFLICT" APPLICABLE TO THIS CASE AND WORTHY OF THIS COURT'S REVIEW, WHERE ANY PURPORTED CONFLICT AMONG THE CIRCUITS REGARDING THE ELEMENTS OF A MALICIOUS PROSECUTION CLAIM IS IMMATERIAL, AS THE SIXTH CIRCUIT CORRECTLY HELD THAT THE KEY ELEMENT OF PROBABLE CAUSE TO ARREST EXISTED AND PETITIONERS DID NOT QUESTION THE ELEMENTS OF A MALICIOUS PROSECUTION CLAIM BELOW?

The District Court says,	"Yes".
The United States Sixth Circuit Court says,	"Yes".
Respondents say,	"Yes".
Petitioners say,	"No".

II. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT PROBABLE CAUSE EXISTED FOR PLAINTIFFS' ARRESTS WHEN AN EYEWITNESS IDENTIFICATION EXISTED AND NO GENUINE ISSUE OF MATERIAL FACT EXISTED TO SHOW THAT EXCULPATORY INFORMATION WAS WITHHELD OR THAT THE EYEWITNESS WAS UNRELIABLE AT THE TIME OF THE ARREST?

The District Court says,	"Yes".
The United States Sixth Circuit Court says,	"Yes".
Respondents say,	"Yes".
Petitioners say,	"No".

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42 U.S.C.§1983 ..... *passim*

COUNTER-STATEMENT OF CASE AND FACTS

Petitioners filed an action pursuant to 42 U.S.C.§1983 seeking damages from individual Detroit police officers for the deprivation of their Fourth Amendment rights for arresting them without probable cause and for the malicious prosecution of the Plaintiffs. Specifically, Petitioners claim that Detective Pearson failed to provide exculpatory information which would have negated probable clause. Petitioners also alleged that the City of Detroit was liable for the officers' constitutional violation because it has a custom or policy of tolerating the arrest of "witnesses" without probable cause. The district court granted summary judgment in favor of the Defendants because "probable cause supported Spencer's and Peet's arrest for the robbery of Reed Byrd based on the eyewitness identification. Ahlers v. Schebil, 188 F.3d 365, 370-371 (6th Cir. 1999). (Pet. Apx. Pgs. 52, 54). The district court held that because probable cause existed to arrest Peet and Spencer, Pearson should be granted summary judgment on their malicious prosecution claim. (Pet. Apx. Pg. 54).

The Sixth Circuit held that "no reasonable juror could disagree that the police could have reasonably believed that Spencer had robbed Reed Byrd, based on Feanda Wilson's knowledge of Spencer's pager number, combined with her statement that the owner of the pager participated in taking Byrd's coat by force". Further, Ms. "Wilson's eyewitness identification statement is trustworthy information" to justify a reasonable belief that Peet and Spencer robbed Byrd

at the time detective Pearson submitted the warrant request. (Pet. Apx. Pgs 75, 76, 80).

UNDERLYING FACTS

Feanda Wilson Meets Peet and Spencer.

In the late night hours of April 27, 2000, Plaintiff Dennis Peet and his cousin, Jeemell Spencer, went to a Super City Coney Island Restaurant on Mack Avenue in the City of Detroit. Plaintiff Peet was driving his wife's blue pick-up truck. When they arrived at the location, Mr. Peet parked the pick-up truck in the parking lot, facing the front of the restaurant which had a glass door. Mr. Peet parked his truck near a red Ford Escort in the parking lot, belonging to the victim, Reed Byrd, Jr.

When Plaintiff and Spencer exited the truck, the restaurant's Clerk, Feanda Wilson, was outside, sitting in the passenger seat of the red Ford Escort with her friend, Reed Roosevelt Byrd, Jr. When Plaintiffs went inside the restaurant to place food orders, Ms. Wilson exited Mr. Byrd's vehicle and entered the restaurant to service them. She left Mr. Byrd seated in the driver's seat of his automobile.

While Ms. Wilson was servicing Plaintiffs, Plaintiff Spencer began speaking to her about securing a date with her. After placing his order, Plaintiff Peet went outside to his truck to prepare a marijuana cigarette and wait for Plaintiff Spencer and the food. Before leaving the restaurant, Plaintiff Spencer gave Ms. Wilson the number to his pager. Shortly after Plaintiff Spencer exited, an unidentified individual rounded the

corner of the Coney Island building and entered a gas station which adjoins the restaurant. An individual named Jmo Bracey was in the gas station and was robbed of his money and jacket by the gunman at gunpoint. Mr. Bracey and Plaintiff Peet have been acquainted since childhood and were neighbors. The gunmen then exited the gas station and entered the Coney Island restaurant, where he robbed and shot a customer, Leonard M^{c}Glory,(also called Leonard Woodward) then exited the building through the front glass door.

The Robbery and Shooting of Byrd

Within seconds after robbing and shooting Leonard M^{c}Glory, the gunman exited the restaurant, walked near Plaintiff Spencer, who pointed to Mr. Reed and told the gunman to, "Shoot that Motherf- -ker, too." The gunman shot Reed Roosevelt Byrd, Jr. after being told to do so by Plaintiff Spencer. After Mr. Reed was shot, Peet and Spencer robbed Mr. Reed of the coat he was wearing as he lay dying. Both Plaintiffs Peet and Spencer and the unidentified gunman then fled the restaurant at the approximate same time after the shooting of Mr. Reed. Ms. Wilson, who was inside the Coney Island at the time of both shootings, witnessed the shooting and robbery of Mr. Byrd, who died after surgery from the injuries sustained in the shooting.

Police at the Scene

City of Detroit Police Officers were called to the scene. Upon their arrival, Officers Robert Peterson and Charles Howard observed the victim, Mr. Byrd, lying on the floor of the restaurant, suffering from a

gunshot wound to the abdomen. Mr. Byrd was conveyed by ambulance to Detroit Receiving Hospital, where he later died.

Statements were taken from individuals who claimed to have witnessed the incident. Feanda Wilson gave a statement which included a description of the gunman and both plaintiffs. She also gave the Police Officers the pager number that had been given to her by Plaintiff Spencer. The other alleged witnesses, Leonard McGlory, Jmo Bracey and Kenya Smith (the cook at the restaurant), also gave the Detroit Police Officers statements.

Feanda Wilson stated that she could clearly observe from the booth the shooting of Byrd by the gunman when Spencer said "Shoot the motherfu------r" and observed the robbery of his coat and shirt by Peet because she could see the car parked through the glass door.

The Investigation of The Murder - The Pager

After the death of Mr. Byrd, City of Detroit Homicide Investigator Dwight Pearson was assigned to be the Officer-in-Charge of the murder investigation. During the course of the murder investigation, Plaintiff Spencer was located and identified through the pager number he had given to Feanda Wilson. Plaintiff Peet was discovered to be the person who was with Jeemell Spencer on the night of the murder. Spencer and Peet were conveyed to the Homicide Unit of the Detroit Police Department and Spencer was positively identified by Feanda Wilson as the individual who told the gunman to shoot Reed

Byrd and Peet was identified as the person who robbed Mr. Byrd of his jacket. Based on Feanda Wilson's positive identification, Investigator Pearson prepared a Warrant Request and presented it to the Wayne County Prosecutor's Office. Operating on the premise that Ms. Wilson's statement established a prima facie case of probable cause relative to whether Plaintiffs-Petitioners were working in concert with the unidentified shooter, the Warrant Request was presented to the Wayne County Prosecutor. The Warrant Request identified Dennis Peet and Jeemell Spencer as complicit in the felony murder of Roosevelt Byrd, Jr. and detailed each person's involvement. The Investigator's Report and Supplement further advised that a third "unidentified" individual was the gunman. The Warrant Request included witness statements from Leonard M^{C}Glory, Jmo Bracey and John Anderson, who did not identify either Plaintiff as being involved in the murder or robbery of Reed Byrd. On the date that the Warrant Request was prepared by Investigator Dwight Pearson, April 28, 2000 (the day after the murder), Investigator Pearson tendered all then existing Witness Statements to the Wayne County Prosecutor's Office. No evidence or statements were withheld.

The Wayne County Prosecutor's Office submitted the Warrant Request to a District Court Judge who signed the Warrant Request. Plaintiffs Peet and Spencer were arrested and at a Preliminary Examination on May 24, 2004, both Plaintiffs were bound over for trial on the following charges: (1) First Degree Premeditated Murder; (2) Felony Murder; (3) Assault with Intend to Commit Murder; and (4) Felony Firearm. On March 12, 2001, both Plaintiffs were

acquitted in a jury trial held in Wayne County Circuit Court's Criminal Division.

During the continued investigation, Investigator Pearson became aware of the fact that Ms. Wilson was the only witness who implicated Peet and Spencer. He included the following in his Progress Notes on May 2, 2000:

> 5-2-00
>
> 8:00 pm After reviewing all statements given, Feanda Wilson is the only statement out of place. Setting up polygraph for her for 5-3-00 to see if she is lying about the suspect the warrant was typed on. Feanda no longer works at Super Coney Island. Fired for stolen money from business.

Jmo Bracey made a statement on April 28th and described the three perpetrators. In his initial statement he stated that one of the suspects gave Feanda his pager. Bracey said as the Sixth Circuit noted, that "the girl who worked in the Coney Island", presumably Feanda Wilson, "told him that the men had been in the restaurant prior to the shooting" and that a friend of the shooters had given her his number". (Pet. Apx. Pg. 76).

None of the witnesses provided exculpatory information until after the warrant request and their credibility was questionable. The first witness, Julian "Doc" Latham, is a homeless individual who allegedly witnessed the subject incident. Plaintiff located him,

picked him up and brought him to a deposition in this matter. Mr. Latham testified at the deposition that he has known both Plaintiffs for many years and considers them "like family." After the murder, Mr. Latham was located and conveyed to the Detroit Police Department to give a statement concerning what he observed. Once at Police Headquarters, however, it was learned that Mr. Latham had outstanding warrants for his arrest and was sent to the Dickerson Correctional Facility after he gave his witness statement. The second witness was Jmo Bracey. Mr. Bracey was arrested after Mr. Byrd's death, but not as a witness; Mr. Bracey admitted at a deposition that he was arrested for attempting to distribute drugs. After he bonded out of jail, he voluntarily presented to the Detroit Police Department's Homicide Unit and told the officers that he had been threatened by Dennis Peet's family members to "tell the police that Dennis was not involved and feared for his life."

The third witness, Darryl Williams, testified at a deposition that he is Plaintiff Peet's "best friend." He went to Jmo Bracey's home and told him (Bracey) that Dennis Peet's family wanted him to go down to the Police Homicide Unit and tell the police officer that it "wasn't them" (referring to Peet and Spencer). Mr. Williams was advised that if he continued with his antics, he would be arrested and charged with "Interfering in a Police Investigation." Leonard Woodward's (aka Leonard McGlory) statement which was given to the prosecutor, did not state that Peet and Spencer were not involved, because he made no such representation in his statement. Woodward allegedly made these verbal representations of Peet

and Spencer's innocence after the warrant request and during this civil litigation.

REASONS FOR DENYING THE WRIT

Petitioners try to inflate this case into one presenting an important question regarding the scope of the elements of a malicious prosecution claim under the Supreme Court case of Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed. 2d 114 (1994), but it is nothing of the sort. The Sixth Circuit Court of Appeals correctly determined that probable cause to arrest the Petitioners existed based upon an eyewitness identification and other evidence. Further, the conflict among the various circuits on the proper elements of a malicious prosecution claim is immaterial to the outcome of the case in light of the record and does not present an issue of practical significance to warrant review by this Court.

I. CONSIDERATION OF THE ALBRIGHT DECISION TO DEFINE THE ELEMENTS OF MALICIOUS PROSECUTION IS IMMATERIAL TO THE OUTCOME OF THE CASE AND THE ISSUE DOES NOT WARRANT REVIEW BY THIS COURT AS THERE IS NO "TRUE CONFLICT" IN THE INSTANT CASE.

The Petition presents no compelling reason supporting the exercise of this Court's jurisdiction. The Sixth Circuit Court of Appeals correctly interpreted and applied the law according to the specific factual circumstances of this case. It properly determined that probable cause to arrest Petitioners Peet and Spencer existed. The decision comports with published

precedent and was correctly applied according to the facts. The Sixth Circuit's decision does not warrant intervention by this Court.

In an effort to prove otherwise, Petitioners raise the issue of a conflict among the various circuits regarding the elements of a malicious prosecution claim to justify the court's intervention and the alleged need to elaborate upon the correct elements. Petitioners do so based on the misleading argument that this case falls within "'the embarrassing diversity of judicial opinion" over the composition, or even existence, of a claim for 'malicious prosecution' founded in §1983". (Petitioners' Brief, p 11).

The Petitioners' reason for granting the writ based on the conflict of the various circuits, is not based on the issues actually raised by Petitioners below or actually decided or addressed by the Sixth Circuit because it was not germane to the determination of the decision below. Petitioners raise the issue of the varying standards to establish a malicious prosecution claim for the first time in this Court on the false premise that bears no resemblance to what issues were actually raised and decided in lower court.

The glaring conflict among controlling Federal circuit court precedents as to what elements establish a malicious prosecution claim under §1983 is not relevant or material to the outcome of the instant case. Petitioners did not raise the issue regarding the scope of the elements of a malicious prosecution claim and it is hereby waived. See Thurman v. Yellow Freight Systems, 97 F.3d 833, 835 (6th Cir. 1996). The sole issue upon which the parties focused and battled was

whether "probable cause" existed to arrest the Petitioners. The district court aptly pointed out that both Peet and Spencer relied heavily on the argument that Defendants lacked probable cause to arrest as the basis for establishing their malicious prosecution claim. The district court noted that "Plaintiffs claim that Pearson did not have probable cause to order them arrested and that Pearson manufactured probable cause by twisting the witness statements". (Pet. Apx. Pg 54). The district court found that Pearson had probable cause to arrest. The Sixth Circuit affirmed the grant of summary judgment because of the existence of probable cause. (Pet. Apx. Pg., 80, 82).

This was not a case where the issue raised below was based on what elements would prove a §1983 malicious prosecution claim such that if the court had adopted certain elements as Petitioners claim, the Petitioners claim would proceed to trial. (Petitioners' Brief p.11). Thus, even if a conflict exists among the circuits, this case presents a poor vehicle for resolving it. As emphasized, the resolution of the issue of the proper elements of a malicious prosecution claim is immaterial to the case and will not resurrect this claim.

Following the United States Supreme Court decision in Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed. 2d 114 (1994), the Sixth Circuit recognized that a §1983 claim for malicious prosecution is based on the Fourth Amendment. The Albright decision did not negate the fact that probable cause for the arrest and prosecution of a person remains a chief defense to the claim of malicious prosecution. Thacker v. City of Columbus, 328 F.3d

244 (6th Cir. 2003); Darrah v. City of Oak Park, 255 F.3d 301 (6th Cir. 2001). Only the issue of whether probable cause existed was raised and no other issue related to the malicious prosecution claim was addressed. No one questioned the fact that the petitioners had to prove the absence of probable cause, which they failed to do. Accordingly, it is irrelevant and immaterial to this case that there may be some dispute over all of the elements of a §1983 malicious prosecution claim. It does not matter in the instant case because it is established that where there is probable cause to prosecute, an action for malicious prosecution will not lie. See, e.g. McKinley v. City of Mansfield, 404 F.3d 418, 444-45 (6th Cir. 2005).

The Sixth Circuit Court of Appeals and the district court both found that probable cause existed to arrest. Therefore, the split authority among the circuits as to the proper elements of a claim of malicious prosecution has no bearing on this case. A review of circuits addressed in the Petitioner's Writ show they all include the key element of the absence of probable cause to establish malicious prosecution. Judge Holschuh's dissent discussing the elements of a malicious prosecution claim was based on his belief that probable cause existed. Therefore, he thought it was necessary to "suggest" what the other proper elements should be to establish the claim.

II. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT BECAUSE PLAINTIFF FAILED AS A MATTER OF LAW TO PROVE A CONSTITUTIONAL VIOLATION UNDER 42 U.S.C. 1983 AND THE FOURTH AMENDMENT, AS THE POLICE ARRESTS WERE BASED ON PROBABLE CAUSE.

The Sixth Circuit Court properly held that the police had probable cause to believe that Spencer and Peet robbed Reed Byrd at the Coney Island. Probable cause to issue an arrest warrant existed in the instant case based on the eye witness identification statement of Feanda Wilson and the line up identification. Peet and Spencer's arrests were based on the independent observations of an eyewitness, Feanda Wilson. A law enforcement officer is entitled to rely on an eyewitness identification to establish adequate probable cause with which to sustain an arrest. Ahlers v. Schebil, 188 F. 3d. 365, 370 (6th Cir. 1999); Skousen v. Brighton High School, 305 F.3d 520 (6th Cir. 2002). Petitioners Peet and Spencer failed as a matter of law to present sufficient evidence that Defendant Pearson and the individual officers deprived them of their constitutional rights under the Fourth Amendment. No genuine issue of material fact existed to dispute that the warrant was issued based upon the existence of probable cause to arrest the Petitioners. See, Vakilian v. Shaw, 335 F. 3d 509, 517 (6th Cir. 2003). The existence of probable cause is an absolute bar to a §1983 claim arising out of the investigation, arrest, detention, or prosecution of a plaintiff. Criss v. City of Kent, 867 F.2d 259, 262-263 (6th Cir., 1988).

The arrests were proper because it was based on facts Officer Pearson had knowledge of at the time of the arrests which established probable cause to arrest. A police officer has probable cause to make an arrest when, at the moment of the arrest, the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information, are sufficient to warrant a prudent and fair-minded person's belief that the plaintiff had committed a felony. Criss v. City of Kent, supra at 262; Michigan v. DeFillippo, 443 U.S. 31, 37, 99 S. Ct. 2627, 2632; 61 L.Ed.2d. 343 (1979).

In the instant case, Feanda Wilson provided the eyewitness testimony. She gave Officer Pearson the pager number of Spencer. Spencer gave his pager number to her for her to contact him. She named him as the person who stated "Shoot that M_ _ _F_ _ _ too." Wilson informed the police that one of the robbers had "been in the restaurant and gave me his phone number it was 232-0235 or 6235". (Pet. Apx. Pg. 76). It is uncontested that the pager belonged to Spencer. She stated that Peet was with Spencer and stole Mr. Byrd's coat or assisted with the theft. Based on Feanda Wilson's statement alone, and later her line up identification of the two, Officer Pearson requested a warrant because there was probable cause to believe Spencer and Peet were working in concert with the unidentified shooter.

Petitioners' chief objection to their arrest is based on Officer Pearson's and the other officer's failure to accept or investigate their exculpatory version of the facts. Probable cause is not negated, however, simply because Petitioners later had witnesses to state that

they were not the murderers or involved with the crime. At the time of the warrant request, none of the witnesses stated in their statements that Spencer or Peet were not involved in the murder. In fact Jmo Bracey indicated that "one of the suspects gave Feanda his pager". Pearson had sufficient inculpatory evidence to give rise to a determination of probable cause. He did not know of any exculpatory evidence that existed at the time of the warrant request.

The alleged evidence and witness statements that Petitioners argue were "twisted, misrepresented or falsified" did not exist on the date that Investigator Pearson submitted the Warrant Request to the Wayne County Prosecutor's Office. The subject crimes occurred in the late night hours of April 27, 2000. The Warrant Request was tendered to the Wayne County Prosecutor's Office the next day, April 28, 2000, accompanied by all then-existing witness statements and summations. No witness stated that Peet or Spencer were not involved in the crime. Where the police have sufficient inculpatory evidence to give rise to a determination of probable cause, failure to perform further investigation does not negate probable cause. Ahlers v. Schebil, supra, at 371; Klein v. Long, 275 F.3d 544 (6th Cir. 2001).

The eyewitness statement and line-up identification of Feanda Wilson was sufficient to implicate Peet and Spencer in the robbery of Mr. Byrd and as conspirators in his murder. Her eyewitness identification was sufficient to create probable cause at the time of the arrest. Officer Pearson was armed with an eyewitness statement, a pager and a line-up identification when he applied for the arrest warrant.

Even prior to the line up, he had probable cause to arrest. In Crockett v. Cumberland College, 316 F.3d 571 (6th Cir. 2003), this Court stated:

> The probability of criminal activity is assessed under a reasonableness standard based on "an examination of all facts and circumstances within an officer's knowledge at the time of an arrest." (Citations omitted)
>
> . . .
>
> Once an officer establishes probable cause, he or she is under no obligation to continue investigating and may instead pursue the arrest of a suspect. See Klein, 275 F. 3d at 551 ("But once a police officer has sufficient probable cause to arrest, he need not investigate further."); (citations omitted).

Crockett, 316 F. 3d at 580-81 (6th Cir. 2003). Therefore, a review of whether probable cause was sufficient for an arrest warrant to be issued is limited to only those factual circumstances known to the officer at the time of the arrest. A suspect's protest of innocence or request for an investigation does not state a claim and the Constitution does not guarantee that only the guilty will be arrested. Baker v. McCollan, 443 U.S. 137, 99 St. Ct. 2689, 61 L. Ed. 2d 433 (1979).

There is no scintilla of evidence that supports the argument that Defendant Pearson in any manner "twisted, misrepresented or falsified witness statements." Significantly, even after the Warrant Request had already been presented to the District Court Judge and signed, Inspector Pearson continued

to investigate the crime to ensure that the correct persons were brought to justice. During the continuing investigation, Investigator Pearson became aware of the fact that Ms. Wilson was the only witness who implicated Peet and Spencer. He included the information in his Progress Notes that he wanted to give her a polygraph exam to determine if she was lying and to inquire about her being fired from her job for theft. Pearson's notes were submitted to the prosecution.

The Sixth Circuit properly "concluded that there is no evidence in the record that Investigator Pearson or the county prosecutor or anyone else supplied the magistrate judge at the hearing with false information to establish probable cause (Pet. Apx., Pg. 81). The Sixth Circuit noted that the "transcript of the preliminary examination in the record shows that the only defense argument made was the alleged insufficiency of the evidence to support the charges, and that argument did not rely on any allegation that false information had been supplied." (Pet. Apx. P. 81).

This entry is important for several reasons. First, the Progress Notes and all the fruit of the investigation were made available to the Wayne County Prosecutor's Office, after the issuance of the warrant. The Prosecutor could have withdrawn the Warrants for Peet and Spencer at any time. The investigation results were also provided to defense counsel. Secondly, the entries establish that Investigator Pearson did not "twist, misrepresent or falsify" any witness statements or have an interest in doing so. Thirdly, it establishes that Investigator Pearson fully disclosed the existence of both

inculpatory and exculpatory statements. The polygraph never occurred, through no fault of Investigator Pearson.

Plaintiffs' defense counsel advised the criminal court judge that the alleged exculpatory witnesses, Jmo Bracey and Leonard Woodward ("McGlory"), had been contacted to come to court and testify on Plaintiff's behalf at the Preliminary Examination. The witnesses' failure to appear is in no way attributable to Defendants.

The witness statements of these alleged witnesses clearly established that no such denial of culpability on the parts of Plaintiff Peet or Spencer were made by these witnesses at the time of the arrest warrant. Not one statement indicates that "Peet and Spencer were not involved." Significantly, none of the evidence of the witnesses "statements" amount to significant, reliable new evidence that suggested that Peet and Spencer were the wrong men or negate probable cause in light of the eyewitness identification of Wilson. None of these verbal statements were made on April 28, 2000. Neither Bracey, Anderson nor Woodward spoke to Defendant Pearson; they were questioned by and gave statements to Defendants William Peterson, Barbara Simon and Frazier Adams, respectively. Most importantly, Petitioners have not submitted one iota of evidence which negates the probable cause created by Feanda Wilson's Witness Statement and positive identification of Peet and Spencer. The mere existence of a scintilla of evidence in support of their claim and some existence of factual dispute on immaterial issues is insufficient to overcome summary judgment.

Anderson v. Liberty Lobby,Inc. 477 U.S.242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

There is no question as to whether Feanda Wilson's statements and identification of Plaintiff constituted probable cause for Plaintiff's arrest. In addressing the issue of probable cause, District Court Judge Jimmylee Gray ruled, in pertinent part, as follows:

> Therefore the Court finds that there's probable cause to believe that Jeemell Spencer by ordering the shooter to shoot and kill Mr. Byrd did, in fact, participate in a first degree premeditated murder. And the Court will bind Mr. Spencer over on that count.
>
> The Court is also of the belief that both Mr. Spencer and Mr. Byrd (sic) knew what was happening and believe - - the Court believes that all three individuals were acting in concert. And the Court finds that there's probable cause to believe that the murder of Mr. Byrd did occur while the armed robbery was occurring and that Mr. Spencer and Mr. Peet participated in the - - along with the third person unidentified with the weapon. So both Defendants are bound over on Count 2.

The Judge found that probable cause existed for Peet and Spencer's arrests based on Feanda Wilson's testimony.

The Sixth Circuit properly determined that there is no authority to support the principle that the police have a Fourth Amendment obligation to release a

suspect once exculpatory evidence comes to light. (Pet. Apx. P. 78). The Sixth Circuit aptly pointed out that "[w]e note that policy does not support such a new development in the law. Such a rule would give investigators the responsibility to reevaluate probable cause instantly with every additional witness and scrap of evidence collected". (Pet. Apx. Pg. 78-79).

Further, Peet and Spencer did not raise the issue that deficiencies in the warrant request amounted to an unconstitutional arrest, which is the theory of the dissent. Therefore, that argument is not properly before this Court. Spencer and Peet only argued that the discrepancies in the warrant request proved that the "officers lacked probable cause for the initial arrest". (Pet. Apx. Pg. 79).

Assuming Peet and Spencer's argument of an unconstitutional arrest is properly before the Court, the Sixth Circuit pointed out the serious flaws in the dissent's analysis:

> First, the dissent relies on information that Pearson obtained after he submitted the warrant request to suggest that Pearson always doubted whether probable cause existed. The evidence, however, shows that Pearson submitted the warrant request on the day after the murder, when signs suggested Spencer and Peet's culpability, and the record does not show that authorities questioned their case after the initial arrest but before authorities submitted the warrant request. The dissent points to Pearson's deposition statement that he "might have had doubts" about Wilson's truthfulness

> before the warrant was signed, but even if Pearson had doubts before the warrant was signed, Pearson's statement does not indicate that those doubts existed before the warrant request was submitted. Second, the dissent faults the investigators for mentioning Wilson's eyewitness identification in their warrant request. While it is true that Wilson identified Spencer and Peet after the initial arrests, her eye-witness identification undermines Spencer's and Peet's claim that there was no probable cause at the time that Pearson submitted the warrant request. In essence, the dissent faults authorities for failing to include post-warrant exculpatory evidence but then faults authorities for including post-arrest incriminating evidence. In this case, there was probable cause at the time of the initial arrest, and the evidence after the arrest but before authorities submitted the warrant requested did not clearly exonerate Spencer and Peet. Third, the dissent demands a level of perfection that would be difficult for most police departments to meet. Undoubtedly, the magistrate judge would have benefitted from a more precise warrant request. ... Such precision, where there is probable cause to justify an arrest, is not a constitutional requirement. (Pet. Apx. Pg. 79-80).

Peet and Spencer's claim for malicious prosecution was correctly dismissed because of the judicial determination of probable cause following the evidentiary preliminary hearing. The determination has a preclusive effect to prevent them from relitigating the issue on a theory of malicious

prosecution because Spencer and Peet failed to show that the state judge relied on false information to determine probable cause existed. See Buttino v. City of Hamtramck, 87 Fed. Appx. 499, 502-05 (6th Cir. 2004). The Sixth Circuit correctly determined that:

> "[T]here is no evidence in this record that Investigator Pearson or the county prosecutor or anyone else supplied the magistrate judgment at that hearing with false information to establish probable cause. To the contrary, the transcript fo the preliminary examination in the record shows that the only defense argument made was the alleged insufficiency of the evidence to support the charges, and that argument did not rely on any allegation that false information had been supplied. (Pet. Apx. Pgs. 81-82).

The Sixth Circuit found that the district court properly granted summary judgment of Peet's claim not only for the above reasons, but because Pearson did not participate in the arrest of Peet. Significantly, there was probable cause to arrest Peet. Feanda Wilson testified at the preliminary examination and in her written statement that Peet was with Spencer and stole Mr. Byrd's coat or assisted with the theft of the coat at the time of death. She identified both of them as stealing the coat. Therefore, there was evidence they acted in concert. The magistrate judge believed that the testimony of Miss Wilson showed that the three suspects were working together in concert and that both Peet and Spencer participated in the robbery of Mr. Byrd.

Petitioners Peet and Spencer's claim that the Wilson identification was unreliable because she was smoking marijuana, her view was obstructed by bullet proof glass and she stole money from the Coney Island on the night in question, does not negate the existence of probable cause or remove Defendant Pearson's objectively reasonable actions. First, there is no evidence to show that Officer Pearson knew about the alleged marijuana, theft, nor any testimony that her view of the murder was obstructed at the time of the warrant request. At the time he submitted all the information available to him to the Prosecutor on April 28, 2000, none of these alleged statements or representations were known to him. Second, when Pearson learned of the allegation that Wilson was fired, he provided all copies of Pearson's case notes to the prosecutor, including the note that Wilson had been fired for theft. Third, Feanda Wilson denied she was fired for stealing on the night in question. She stated that she received her entire check from the job after the incident and subsequently worked for friends of the owners after the murder. Furthermore, the testimony about her lack of ability to view the scene only arose during this civil litigation, in the deposition testimony. No evidence existed to make Ms. Wilson's testimony unreliable at the time the information was submitted to the Prosecutor for a warrant request.

In challenging the affidavit Peet and Spencer rely on several cases in which §1983 claimants prevailed after showing officials made false statements in arrest warrant affidavits. But in those cases, such as Wilson v. Russo, 212 F.3d 781 (3rd Cir. 2000), the remaining evidence did support a finding of probable cause. In Wilson v. Russo, supra, the court determined that the

warrant would have established probable cause without the Defendant's omission or disregard for the truth. Therefore, the arrest was based on probable cause. In the instant case, even without the warrant, Feanda Wilson's identification created probable cause. Petitioners failed to point out specific material false facts that show reckless disregard for the truth and therefore their argument does not undermine the existence of probable cause. United States v. Moncivais, 401 F.3d 751, 757 (6th Cir. 2005).

Petitioners' reliance on Haupt v. Dillard, 17 F.3d 285 (9th Cir. 1994) and Weg v. Macchiarola, 995 F.2d 15,17-18 (2nd Cir. 1993) is misplaced and does not support their argument that the existence of exculpatory evidence will negate probable cause to continue prosecution. (Petitioners' Brief, p. 21). First, Feanda Wilson's eyewitness identification of both Peet and Spencer and Spencer's pager number established probable cause. Second, Haupt did not suggest or hold that new exculpatory evidence negates probable cause as Petitioners contend. The court in Haupt found that the appearance of a witness did not obviate probable cause to prosecute Haupt. Third, in Weg, the Ninth Circuit held that the memorandum of a witness stating that they did not believe the plaintiff committed the crime did not negate probable cause. The case did not hold that probable cause to continue prosecution disappears with discovery of exculpatory evidence. Fourth, none of the cases support the Petitioners' argument that exculpatory evidence negates probable cause under the facts of this case or as a matter of law.

A. Insufficient Evidence Existed to Create a Custom of Arresting Witnesses Without Probable Cause.

Because Petitioners failed to prove that a constitutional violation occurred, the City of Detroit cannot be held liable where there is no underlying constitutional deprivation. Claybrook v. Birchwell, 199 F. 3d 350, 361 (6th Cir. 2000). The Sixth Circuit Court of Appeals correctly affirmed the grant of summary judgment because Peet and Spencer failed to present sufficient evidence to create a genuine issue of fact that the City has a custom or policy of falsely arresting, detaining, and intimidating witnesses to crimes to extract inculpatory testimony. (Pet. Apx. Pgs. 82-83). Clearly, the Petitioners' reliance upon the purported "arrests" of Darryl Williams, Julian Lathem, Jmo Bracey and Peet does not establish a city-wide policy or custom of unconstitutionally "arresting all individuals at a crime scene and holding them to coerce information". The arrests do not show the existence of a custom of arresting witnesses without probable cause.

Petitioners attempt to interject the district court opinion of Taylor v. City of Detroit, 368 F. Supp. 2d 676, 692 (E.D. Mich. 2005) to establish a "custom" is without merit as the Sixth Circuit specifically noted as follows.

> Peet also points to other evidence that we may not consider. For instance, he alleges that in proceedings in a different case in federal district court in Michigan, a Detroit police sergeant admitted that a custom, policy, and practice of

detaining all witnesses exists in Detroit. In particular, Peet cities Taylor v. City of Detroit, 368 F.Supp.2d 676, 692 (E.D. Mich. 2005), to establish this fact. The district court opinion in Taylor does not demonstrate a policy. First, Taylor itself held only that a genuine issue of material fact exists regarding Detroit's alleged custom of arresting witnesses without probable cause. See id. Taylor did not hold that such a custom actually exists; that issue remains to be decided at a later trial. Second, the Taylor court's holding that a genuine issue of material fact existed in that case was record-specific and may not be automatically imposed on other district courts or this court. Since the evidence on which Taylor's denial of summary judgment in favor of the defense is premised is not before this court, Taylor has no relevance to the "custom" issue in this appeal. Third, while Peet had the district court opinion admitted into evidence, he did not obtain admission of the evidence upon which the district court relied. Finally, the plaintiffs point to a consent judgment entered into by the City and the U.S. Department of Justice. The consent judgment is not part of the record in this case.

All told, the plaintiffs have produced only the arrests of Peet, Williams, and Latham as admissible evidence of a city-wide custom of arresting witnesses without probable cause. But that is not enough to create a genuine issue of material fact. A custom or policy must be shown by a "clear and persistent pattern," and three discrete instances in one investigation is simply

not enough to reasonably draw such a conclusion. See Thomas, 398 F. 3d at 432...., no reasonable juror could infer such a custom or policy based on a mere three instances that are limited to one police investigation. (Pet. Apx. Pg. 84-85).

B. Dwight Pearson Is Entitled to Qualified Immunity.

It should be pointed out that the Sixth Circuit Court of Appeals did not address the Defendants' argument that Dwight Pearson was entitled to qualified immunity.

Officer Pearson's actions in the investigation and warrant request were objectively reasonable and were entitled to qualified immunity. The Petitioners reliance on the dissent's reasons for holding Pearson liable does not undermine this argument. The dissent's reasons for assessing liability to Detective Pearson do not address or analyze the issue of Detective Pearson's entitlement to qualified immunity.

Petitioners have failed to meet their burden of proof to demonstrate that Officer Pearson was not entitled to qualified immunity. As established earlier, at the time of the request for an arrest warrant, there were no statements made by other witnesses which were inconsistent with Ms. Wilson's statement in existence. All the statements which Plaintiff claim show their innocence came after April 28, 2000, the day Pearson submitted information to the Prosecutor and made a warrant application. Hence, the actions of Officer Pearson were objectively reasonable.

The witness testimony does not negate the reasonableness of Officer Pearson's action in submitting the information to the Prosecutor for an arrest warrant based on probable cause. Mr. Bracey gave three different and inconsistent statements. The April 28th witness statement of Jmo Bracey mentioned at the end of his statement Feanda Wilson had the pager number of one of the suspects. His statement did not exonerate Peet or Spencer. The statements Bracey made on May 4 and 10, 2000, and the statements of other witnesses who later claimed that Spencer and Peet were not involved, were submitted after the warrant request. Pearson did not have these so-called exculpatory statements at the time of the arrest. Bracey's May 4th statement indicated he was told to say that Peet was not involved and that he feared for his safety. Probable cause was not negated based on the inconsistent and questionable statements of Jmo Bracey and the other witness statements after the existence of probable cause was established. Ahlers v. Schlieb, supra. Hence, Officer Pearson's actions were objectively reasonable. Officer Pearson was under no obligation to give credence to so-called exculpatory witness statements which became available after the warrant was issued.

The Petitioners failed to establish by a substantial showing that Officer Pearson stated a deliberate falsehood or showed reckless disregard for the truth and/or that the alleged omitted information was material to the finding of probable cause. Vakilian v. Shaw, 335 F.3d 517, 509 (6th Cir. 2003). Therefore, no evidence has been presented to overcome his entitlement to qualified immunity.

Peet and Spencer's baseless assertions that Pearson requested a warrant to arrest Peet despite the fact that he "entertained doubts as to the truth of the allegations" is without merit. There is no evidence that Defendant Pearson entertained serious doubts as to the truth of the Feanda Wilson's testimony at the time of the warrant request. Plaintiffs Peet and Spencer relied on verbal statements of his innocence by witnesses, that did not come forth until after the warrant was issued and pressure arose from Peet and Spencer's family. When probable case had been established from a credible victim or eyewitness there is no constitutional duty to investigate further. Woods v. City of Chicago, 234 F.3d 979, 997 (7th Cir. 2000). Probable cause is considered at the time the arrest warrant request was made. Crockett v. Cumberland College, supra. At the time Officer Pearson submitted all relevant information to the Prosecutor on April 28, 2000, he had no reason to believe that Ms. Wilson was not telling the truth.

Taking reasonable action, Pearson made note of the other officers concern that Ms. Wilson's testimony differed from the other statements in the Progress Notes after the arrest warrant request. He indicated he would ask her to take a polygraph examination. Officer Pearson reasonably acted as an objectively reasonable law enforcement officer in continuing to investigate when he realized Ms. Wilson was the only person who implicated Spencer and Peet.

In Hutsell v. Sayre, 5 F.3d 996 (6th Cir. 1993) Petitioners alleged that the police officer obtained a warrant through material false statements made either knowingly or in reckless disregard for the truth.

The Sixth Circuit Court of Appeals stated that "police officers are entitled to qualified immunity however, unless the warrant is so utterly lacking in probable cause that no officer of reasonable competence would have concluded that a warrant should issue". In the instant case, no genuine issue of material facts exist to support the conclusion that the warrant was lacking in probable cause or that Officer Pearson made false statements to obtain the warrant.

It is important to note that in Vakilian v. Shaw, supra, the Sixth Circuit rejected plaintiff's argument that when an allegation of a false swearing to obtain a warrant exists, probable cause is for the jury. See generally, See United States v. Campbell, 878 F. 2d 170, 171 (6th Cir. 1989) (alleged false statements in a supporting affidavit do not invalidate the warrant if the remaining undisputed facts establish probable cause). The Sixth Circuit held that the issue of probable cause is one for the court when qualified immunity is asserted. In Vakilian, supra, the Sixth Circuit Court of Appeals reversed the district court's denial of the defendants' request for qualified immunity. In Vakilian plaintiff charged the defendant with recklessly disregarding the truth in a warrant affidavit. Under the factual circumstances, as a matter of law, Defendant Pearson is entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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